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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May a local governmental agency limit the distance of non-stop airline flights, in view of section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1), which prohibits states and interstate agencies from regulating the "rates, routes, or services of any air carrier"?

2. Do the "proprietary powers" of airport operators preserved by section 105(b)(1) of the Airline Deregulation Act, 49 U.S.C. app. § 1305(b)(1), include the power to impose an extraterritorial restriction upon the distance of non-stop flights?

3. Does a local governmental agency operating airports have any jurisdiction over the use made by airlines of airport "landing slots" granted by the FAA under 14 C.F.R. §§ 93.121-93.133?

PARTIES INVOLVED

The parties to this proceeding in the courts below were Western Air Lines, Inc., and the Port Authority of New York and New Jersey. On April 1, 1987, after final briefing and argument in the Court of Appeals, Western Air Lines, Inc. merged with Delta Air Lines, Inc. This petition is brought by Delta Air Lines, Inc., as the surviving company following the merger.*

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* The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc. are Atlantic Southeast Airlines, Inc.; Comair, Inc.; and Gatwick Handling, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Delta Air Lines, Inc., prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on April 22, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported at 817 F.2d 222, is reproduced in the appendix at pp. 19a-27a. The District Court's opinion, reported at 658 F. Supp. 952, is reproduced in the appendix at pp. 1a-18a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 22, 1987.

(App. 19a.) The Court of Appeals denied a timely petition for rehearing on May 28, 1987. (App. 28a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

49 U.S.C. app. § 1305(a)(1):[1]

> Except as provided in paragraph (2) of this subsection [relating to Alaska], no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. app. § 1305(b)(1):

> Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier cer-

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[1] Since its 1982 edition, the official version of United States Code has presented title 49 in a main portion (containing sections enacted into positive law) and in an appendix (containing other sections). The sections of title 49 referred to in this petition are contained in chapter 20, which has not yet been enacted into positive law, and are therefore cited to the appendix. The bound volumes of U.S.C.A. and U.S.C.S. and the current pocket part to U.S.C.A. present chapter 20 (the sections of which are uniquely numbered) in the main portion of title 49.

tificated by the Board to exercise its proprietary powers and rights.

STATEMENT

In 1978, Congress enacted the Airline Deregulation Act, ending forty years of pervasive federal economic regulation of commercial aviation under the auspices of the Civil Aeronautics Board ("CAB"). Pub. L. No. 95-504, 92 Stat. 1705 (1978). Premised on a declaration that "maximum reliance [should be placed] on competitive market forces and on actual and potential competition," the Act provided that deregulation would occur over a seven-year period during which requirements that air carriers obtain prior CAB approval of the rates they charged, the routes they served, and the services they provided would be eliminated in phases. 49 U.S.C. app. §§ 1302(a)(4), 1551. While federal economic regulation was eliminated, the Federal Aviation Administration ("FAA") remained responsible for managing the nation's airspace.

To prevent local authorities from regulating what Congress intended to deregulate, the Act included preemption provisions which, with certain limited exceptions, explicitly preempted regulations "relating to rates, routes, or services of any air carrier." 49 U.S.C. app. § 1305(a)(1). At the same time, the Act preserved the then-existing "proprietary powers and rights" of local entities operating airports. 49 U.S.C. app. § 1305(b)(1).

Since deregulation, the airline industry has grown substantially. With flexibility in rates and fares, existing airlines expanded and new ones emerged. Passenger miles grew 61.5% between 1978 and 1986 and takeoffs and landings rose 28.0%. In this atmosphere,

competition heightened and fares dropped, in many cases dramatically. AIRLINE TRANSPORT ASS'N, AIR TRANSPORT—1987: THE ANNUAL REPORT OF THE U.S. SCHEDULED AIRLINE INDUSTRY 2 (1987).

At the time this action was commenced, Western Air Lines operated daily flights out of a hub located in Salt Lake City, Utah,[2] and, after Western's merger with Delta Air Lines, Delta continues those operations today. A hub is an airport used by an airline as its central point of origination for connecting flights. By coordinating flights through a hub, an airline can serve various city pairs that cannot be served economically on a non-stop basis.[3]

In 1984, respondent, the Port Authority of New York and New Jersey, adopted a rule that established the maximum permissible distance of non-stop flights into and out of LaGuardia Airport at 1500 miles.[4] The stated purpose of the rule is to "reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting traffic to Newark and Kennedy."[5]

In order to compete effectively in the New York City airline market, Western determined that it must provide nonstop service to LaGuardia from its Salt Lake City hub. LaGuardia is one of four high-traffic

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[2] App. 2a, 658 F. Supp. at 953.

[3] *Id.*

[4] *See id.* ("Prior to 1984, the perimeter rule at LaGuardia was an informal one . . . .").

[5] *Id.* The Port Authority also operates Newark and Kennedy International Airports. *Id.*

airports[6] where arrivals and departures are limited by the FAA through the use of "slots".[7] Accordingly, Western applied for and received several highly desirable slots at LaGuardia in a March 27, 1986, lottery conducted by the FAA. (App. 20a, 817 F.2d at 223.)

Upon receiving these slots, Western requested the Port Authority to allow it to commence non-stop service between LaGuardia and Salt Lake City. The Port Authority denied those requests solely because Salt Lake City is 1,989 miles from LaGuardia. As a consequence, the Port Authority allows Western's (and now Delta's) biggest competitors for air traffic in the Rocky Mountain region (United and Continental) to fly directly between their Denver hubs and LaGuardia,[8] while it allows Delta to serve LaGuardia from its Salt Lake City hub only by use of connecting flights, greatly increasing travelling time and making such routes noncompetitive. Accordingly, Delta is effectively precluded from serving LaGuardia, a vital segment of the New York City market, from its Salt Lake City hub.

On August 13, 1986, Western filed suit in the United States District Court for the Southern District

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[6] The other three high-traffic airports using the "slot" system are Kennedy International Airport, O'Hare International Airport and Washington National Airport. 14 C.F.R. § 93.123 (1987).

[7] A "slot" is the authority to conduct one instrument flight rule landing or takeoff during a specific period. At LaGuardia, a slot allows a takeoff or landing within a thirty minute period. App. 1a, 658 F. Supp. at 953.

[8] Although Denver is 1,638 miles from LaGuardia, the Port Authority has adopted an exception to the perimeter rule to allow non-stop flights to Denver. App. 2a, 658 F. Supp. at 953-54.

of New York challenging LaGuardia's perimeter rule under section 105(a) of the Deregulation Act, 49 U.S.C. app. § 1305(a),[9] and 42 U.S.C. § 1983. The subject matter jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

On September 3, 1986, after a one-day bench trial, the district court denied Western's request for injunctive relief, and dismissed the action. Although the district court ruled that the perimeter rule affected "rates, routes and services" and therefore fell within section 105(a)'s ambit of preemption, it nonetheless upheld the Port Authority's direct and extraterritorial limitation on non-stop flights. The court held that section 105(b) permits a local governmental airport proprietor to impose such rules provided they are "reasonable in light of the legitimate objectives sought to be achieved." (App. 13a-14a, 658 F. Supp. at 959.) Noting the Port Authority's claim that business travellers create less congestion than do vacationers and that the perimeter rule tends to encourage business travel at LaGuardia and to divert vacationers to other airports, the district court ruled that the Port Authority's decision "was not unreasonable." (App. 17a, 658 F. Supp. at 960.)[10]

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[9] Western also asserted claims under 49 U.S.C. app. § 1349(a) (prohibiting exclusion of air carriers from airport facilities) and 49 U.S.C. app. § 2210(a) (the fair treatment provisions of the Airport and Airway Improvement Act of 1982).

[10] It should be noted that all of Florida, probably New York's largest vacation destination, is within the perimeter and is served by many flights from LaGuardia. The Port Authority presented no evidence demonstrating that longer flights, such as New York-Salt Lake City, carry more vacation travellers or create more congestion than flights within the perimeter, such as New York-

Western appealed to the United States Court of Appeals for the Second Circuit. On April 22, 1987 that court affirmed, adopting the rationale of the district court's decision in all respects. With regard to the section 105 preemption issue, the Second Circuit held that "at least when enacted by a multi-airport proprietor such as the [Port] Authority, [a perimeter rule] falls within the proprietary powers of airport operators exempted from preemption by section 1305(b)(1)."[11] While both the Second Circuit and the district court alluded to the fact that the Port Authority runs Newark and Kennedy International Airports as well as LaGuardia, neither court explained how that fact exempted the Port Authority from the express preemption of section 105.

REASONS FOR GRANTING THE WRIT

I. By Sanctioning Local Regulation of Airline Routes as the Exercise of a "Proprietary Power," the Decision Below Conflicts in Approach with Decisions of this and Other Courts.

In enacting the Airline Deregulation Act of 1978, Congress made fundamental changes to the manner in which the airline industry operates and is regulated. Noting that forty years of intensive economic regulation by the Civil Aeronautics Board had resulted in inflexible, inefficient, and noncompetitive operation of the airlines, Congress determined that

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Florida flights. Moreover, as noted in n. 8, *supra*, the Port Authority has adopted an exception to the perimeter rule to allow flights from LaGuardia to Denver, another major vacation destination, even though Denver is more than 1600 miles from LaGuardia.

[11] App. 27a, 817 F.2d at 226.

competition and market forces should determine where airlines will fly and at what price to the public.[12]

During the period of CAB regulation, it was clear that regulation of interstate airline rates, routes, and services by local governments was preempted.[13] Congress continued this preemption through section 105(a)(1) of the Airline Deregulation Act, which expressly provides that—

> no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. app. § 1305(a)(1). Thus, local governments were expressly prohibited from regulating what Congress deregulated.

The courts below recognized that perimeter rules adopted as local *governmental* regulations are preempted by section 105(a). But the courts erro-

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[12] H.R. Rep. No. 1211, 95th Cong., 2d Sess. 2-5, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3737-41; H.R. Rep. No. 793, 98th Cong., 2d Sess. 2-3, *reprinted in* 1984 U.S. Code & Admin. News 2857, 2858-59; *see also* 49 U.S.C. app. § 1302(a)(3),(4),(9).

[13] *See, e.g., Railway Express Agency v. CAB*, 345 F.2d 445, 449 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 879 (1965) ("Under the Federal Aviation Act, the [CAB] is given exclusive authority and responsibility for the economic regulation of the air transportation industry . . . .").

neously held that local governments may achieve this result in their *proprietary* capacity as airport operators. In making this distinction, the courts below relied on section 105(b)(1) of the Act, a provision which was enacted in response to a concern that section 105(a) might prevent local governments owning airports from continuing to exercise their then-existing powers to deal with strictly local problems, such as noise and other environmental problems.[14]

Instead of recognizing the limited scope of the powers reserved to local governmental airport proprietors, the decision below held that they are free to adopt rules which directly regulate rates, routes, and services, so long as the means chosen are "reasonable

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[14] Thus, Dr. William J. Ronan, Chairman of the Port Authority, submitted the following statement to the Senate subcommittee concerning section 105:

> The Port Authority is concerned that this provision may unintentionally impair airport operators' proprietary rights. We understand the object of the provision to be the prevention of states expanding their air transportation regulatory activities at the same time that Federal regulaions [sic] are being loosened. However, its vague wording could be misleading. Specifically, the prohibition against local governmental laws, regulations or standards "relating to" rates, routes and services could be interpreted as limiting the airport operator's *rights to levy charges and promulgate operational regulations* if they are deemed to be "related to" rates, routes and services. Any Federal preemption provisions should therefore state clearly that it [sic] is not intended to infringe on airport operators' proprietary rights.

Regulatory Reform in Air Transportation: Hearings Before Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation, 95th Cong., 1st Sess., pt. 4, at 1990 (1977) (statement of Dr. William J. Ronan) (emphasis added).

in light of the legitimate [local] objectives sought to be achieved."[15] The decision below significantly expands the scope of the "proprietary powers" established by prior decisions and constitutes judicial legislation that seriously undercuts the economic deregulation scheme enacted by Congress.

A. This Court's decision in *City of Burbank*

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), this Court held invalid a city's attempt to limit airport noise by imposing a curfew on takeoffs and landings. This Court noted the broad scope of federal preemption of aviation matters:

> "Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."

Id. at 633-34 (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944)). The decision in *Burbank* recognized that aviation requires "a uniform and exclusive system of federal regulation." 411 U.S. 634-35, 639.

In footnote 14, however, *Burbank* noted the "proprietary powers" exception to broad federal preemption in aviation matters. That exception, as later elaborated by the Courts of Appeals, allows local governmental airport proprietors to regulate the manner in which their airports are used in order to limit noise

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[15] App. 13a-14a, 658 F. Supp. at 959.

and other environmental problems.[16] The Courts of Appeals have considered this power necessary to allow airport proprietors to protect themselves from liability to neighboring landowners for inverse condemnation under *Griggs v. Allegheny County*, 369 U.S. 84 (1962).[17]

Never before, however, has a court construed the proprietary power exception to allow a local governmental airport operator to regulate extraterritorially airline activities that do not occur on the airport's grounds and that do not give rise to any prospect of liability by the airport operator.

B. The decision of the Ninth Circuit in *San Diego Unified Port District*

In deciding that the "proprietary powers" exception permits a local governmental airport proprietor to regulate airline routes and other extraterritorial matters so long as the regulation is "reasonable," the decision below conflicts with the decision in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). In that case, the Ninth Circuit ruled that the proprietary powers exception applies only to regulations imposed by a local governmental agency that are designed to limit the agency's liability arising from its operation

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[16] *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *see also San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1316-19 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *British Airways Board v. Port Authority*, 564 F.2d 1002, 1010 (2d Cir. 1977) ("extremely limited [proprietor's] role").

[17] *See* authorities cited in n. 16, *supra*.

of the airport.[18] The Ninth Circuit's approach is in sharp contrast to that of the decision below, which would permit any local rule that is said to be reasonably designed to address any local problem, without regard to whether local governmental liability might ensue and without regard to its direct effect on rates, routes, or services.

II. The Decision Below Imperils the Congressional Objective of Airline Deregulation.

The decision below also departs from established precedent by granting extraterritorial jurisdiction to local government airport operators and by permitting them to regulate airline rates, routes, and services *directly*. Past decisions, as well as the legislative history of section 105(b), proceeded on the basis that regulations based on an airport operator's proprietary powers would be limited to the proprietary boundaries of the airport and would only *incidentally* affect rates, routes, and services.

By permitting direct local regulation of the length of non-stop flights and thus of rates, routes, and services, the decision below undercuts the federal plan of deregulation. A principal goal of deregulation was to provide abundant, affordable, and convenient air service. This goal was to be achieved by allowing rates, routes, and services to be governed by market forces, not by governmental regulations. Perimeter

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[18] 651 F.2d 1316-17, 1319. Thus, the Ninth Circuit stated that "*City of Burbank*'s proprietor exception looks to who will pay for the taking of air easements." *Id.* at 1319. The court found that because the state agency seeking to regulate did not operate the airport, it could not invoke the proprietary powers exception. *Id.* at 1316-19.

rules, however, thwart this goal by directly prohibiting air carriers from flying where passengers wish to go. Instead, such rules require airlines to make arbitrary and unnecessary intermediate stops on long flights. The ultimate effect is to make air service unnecessarily inconvenient and expensive by prohibiting airlines from offering routes that the market desires but that an airport operator deems undesirable. If widely adopted by local airport authorities, perimeter rules will greatly reduce the availability of direct flights and accordingly will balkanize the nation's airline system.[19]

Moreover, the rationale of the decision below permits a broad range of local governmental regulations covering all phases of airline operations. Thus, the rationale would justify a local governmental airport proprietor in adopting measures intended to reduce ground congestion that reach far beyond the airport's boundaries. For example, a local airport proprietor could discourage vacation travel (which the Port Authority claims its perimeter rule is designed to do) by prohibiting airlines from offering discount fares to vacation travellers. Similarly, a proprietor could limit congestion by limiting the number of passengers airlines may carry, by regulating schedules, or by restricting the amount of baggage that airlines may carry for each passenger.

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[19] This effect would not be reduced significantly if application of the decision below were limited to multi-airport proprietors. Many cities, either directly or through local governmental airport authorities, operate both a principal airport and one or more smaller "satellite" airports. Route limitations at any major airport, based solely on the desires of the local airport operator, do serious harm to the Congressionally mandated market-based system for air travel.

Until the decision below, the fundamental inconsistency between economic deregulation and local rules governing where airlines may fly, such as perimeter rules, was well recognized. As the Civil Aeronautics Board informed Congress during the deregulatory process:

> Enactments by state and local governments relating to routes, rates and services are specifically preempted by the Deregulation Act. What that means, for example, is that an airport may not place procedural hurdles in the path of new air service which have the effect of preventing, or seriously inhibiting, a carrier's management from instituting new service reasonably promptly. *It also means that a local airport authority cannot decide that service to Denver or Salt Lake City is more important than more service to San Francisco. Such actions would thwart deregulation and run counter to the ground rules established by Congress.*

Burbank, Calif., Airport—Noise and Safety Problems: Hearings Before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. at 263 (1980) (statement of Civil Aeronautics Board, presented by Gloria Schaffer) (emphasis added). Thus, under the administrative interpretation of section 105, extraterritorial or direct regulations of routes are not exercises of proprietary powers and are invalid.[20]

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[20] As the courts below apparently recognized, the decision in *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982), is not to the contrary. That decision approved a 1000-mile perimeter

This interpretation is embodied in both federal regulations[21] and administrative decisions. In *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644 (1979), the CAB rejected a claim by the governmental agency operating Dallas/Fort Worth Regional Airport and Dallas' Love Field that it could divert all interstate flights from Love Field to Dallas/Fort Worth by use of its proprietary powers under section 105(b). Finding that section 105(b) "was not intended to give airport operators additional proprietary rights," *id.* at 652, the CAB adopted a decision which found that the prohibition on interstate flights at Love Field "conflict[ed] with the provisions and policies of the Act and [was] therefore invalid." *Id.* at 688.[22]

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rule at National Airport, which was then operated by the FAA, based upon the fact that section 105 by its terms did not apply to federal agencies. *Id.* at 1194.

In the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, §§ 6001-6012, 100 Stat. 3341, 3341-376 to 3341-388, the FAA was authorized to lease National Airport to the newly-formed Metropolitan Washington Airports Authority. A central purpose of that Act was to place National Airport on par with other major airports by giving proprietary control over the airport to a local governmental authority. *Id.* §§ 6002(4), (5), (6), (8). Apparently recognizing the inability of the local airport authority to continue the FAA's perimeter rule, Congress itself enacted the perimeter rule in section 6012 of the Act, at the same time expanding the perimeter to 1250 miles. *See also* 14 C.F.R. § 93.253 (1987).

[21] 14 C.F.R. § 399.110(f) (1987) (proprietary powers must be exercised "in a manner that does not conflict with the provisions and policies of the [Airline Deregulation] Act").

[22] In the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, Sec. 503, 94 Stat. 35, 59-60 (1980), Congress included the so-called "Love Field Amendment," which adopted a legislative compromise prohibiting flights between Love

Thus, the decision below sharply conflicts not only with prior court decisions, but also with applicable federal administrative regulations and precedent.[23]

III. This Court Should Grant Review to Preserve the Exclusive Role of the FAA to Manage the Nation's Airspace.

By permitting local governments to adopt and to enforce their own regulations of airline rates, routes, and services, the decision below seriously hampers the FAA's ability to carry out its duty to promote efficient use of the nation's airspace. 49 U.S.C. app. § 1348. The FAA's need to have broad powers unencumbered by local regulations is particularly acute in view of the remarkable success of the Airline Deregulation Act. Since the Act, there are more flights, more convenient routes and schedules, and more affordable fares. This success, however, has placed a heavy strain on our aviation system.

The FAA, as the federal agency responsible for overseeing the use of the nation's airspace, has taken a variety of steps to deal with these concerns. The FAA has limited congestion at high-traffic airports,

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Field and points outside a four-state area. Significantly, the House Conference Report reaffirmed the general applicability of the preemption provisions of section 105, referred to the Love Field situation as "unique in the air transportation industry," and stated, "Acceptance of this compromise should therefore not be taken as a harbinger of any similar proposals for any other airport or area." H.R. Conf. Rep. No. 716, 96th Cong., 2d Sess. 26, *reprinted in* 1979 U.S. Code Cong. & Admin. News 78, 88.

[23] These regulations and decisions have, in effect, been ratified by Congress, since the recent statutory provision with respect to airports in the Washington, D.C., area would not be necessary if the Second Circuit here were correct. *See* n. 20, *supra*.

including LaGuardia, by instituting a slot system under which landings and takeoffs by commercial air carriers are allocated among airlines. 14 C.F.R. §§ 93.211-93.229 (1987). The FAA could have awarded those slots on the basis of a perimeter rule or some other route-based criterion, but instead determined that slots should be awarded without regard to rates, routes, or services.[24] In so doing, the FAA preserved the effects of market forces to the maximum extent possible. At the same time, unnecessary takeoffs and landings at intermediate points entailed by perimeter rules were avoided.

In establishing a perimeter rule at LaGuardia, the Port Authority has undermined these goals. As this Court recognized in striking down the landing curfew in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the FAA must be allowed to continue its exclusive control over use of the airspace without interference from rules made by local governments:

> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded. . . . We are not at liberty to diffuse the powers given by Congress to FAA

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[24] *See* Special Federal Aviation Regulation No. 48, 51 Fed. Reg. 8632, 8635, 8637-38 (Mar. 12, 1986) (allocation by lottery; slots only restricted to domestic passanger use).

> . . . by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

411 U.S. at 639-40. By upholding LaGuardia's perimeter rule, the decision below lets the Port Authority in on the planning and dilutes the FAA's ability to regulate congestion through its slot system and other measures. As stated in *City of Burbank*, such dilution of the FAA's authority should be done only with Congressional authorization.[25]

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[25] Congress did specifically authorize perimeter rules at National Airport and Love Field. *See* nn. 20 & 22, *supra*. But there is no such Congressional authorization here.

CONCLUSION

Absent certiorari being granted, federal regulation of the airline industry will be replaced by the regulation of fifty states and countless airport authorities and the mandate of Congress to deregulate may be voided by the decision below. The petition for certiorari should be granted.

Respectfully submitted,

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August, 1987

APPENDIX

APPENDIX A

WESTERN AIR LINES, INC.,

Plaintiff,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant,

No. 86 Civ. 6259 (JMC).

United States District court,
S.D. New York.

Sept. 3, 1986.

Roger M. Deitz, New York City, for plaintiff.
Patrick J. Flavey, New York City (Arthur P. Berg, Jay Adlai Selcov, of Counsel), for defendant.

OPINION

CANNELLA, District Judge:

After a nonjury trial on the merits, plaintiff's claims for preliminary and permanent injunctive relief are dismissed. Fed. R. Civ. P. 65(a)(2).

FACTS

Plaintiff Western Airlines ["Western"] brings this action against defendant Port Authority of N.Y. & N.J. ["Port Authority" or "Port"], seeking preliminary and permanent injunctive relief against enforcement by the Port of its so-called perimeter rule. The undisputed facts are as follows.

Western is the holder of several slots at LaGuardia Airport ["LaGuardia"]. Each slot permits Western to conduct one landing or takeoff operation during a 30-minute period.

Western obtained these slots in a lottery conducted by the Federal Aviation Administration ["FAA"] on March 27, 1986 and will lose them unless it commences service at LaGuardia by September 17, 1986.

Western maintains its hub in Salt Lake City. The hub permits the airline to serve city pairs by one stop or connecting flights when such city pairs cannot be served economically on a point-to-point nonstop basis. Western intended to begin operating three daily nonstop flights in each direction between LaGuardia and Salt Lake City on September 3, 1986.

The Port Authority operates Kennedy International Airport ["Kennedy"], LaGuardia, and Newark International Airport ["Newark"]. Since the late 1950's, the Port has had a perimeter rule at LaGuardia, which forbids airlines using LaGuardia to run nonstop flights beyond a set distance. The stated purpose of the rule is to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark. Of the three airports operated by the Port, LaGuardia is the smallest with 662 acres, followed by Newark with 2300 acres, and Kennedy with 4930 acres. Neither Newark nor Kennedy is subject to a perimeter restriction.

Prior to 1984, the perimeter rule at LaGuardia was an informal one, prohibiting most international operations, and nonstop operations in excess of 2000 miles. In 1984, the Port Authority set in place a formal rule, which reduced the permissible distance for nonstop operations to 1500 miles. The new rule does permit flights to Denver, although Denver is more than 1600 miles from LaGuardia. According to the Port Authority, Denver was "grandfathered" under the new rule because there had been continuous nonstop service between LaGuardia and Denver since 1981 and that service accounted for a significant portion of LaGuardia operations. At the time the rule was adopted, three air carriers operated LaGuardia-Denver service.

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Salt Lake City is located almost 2000 miles from LaGuardia. Western now serves Salt Lake City with two daily round-trip flights at Kennedy. Because Western believes that LaGuardia serves a lucrative business market, it has sought permission from the Port authority, in May 1985 and again in early 1986, to conduct New York-Salt Lake City operations from LaGuardia. The Port has denied permission on the basis of the perimeter rule.

In this action, Western alleges that the perimeter rule violates various federal aviation statutes[1] and the Civil Rights Act of 1871,[2] and is invalid under the Supremacy,[3] Equal Protection,[4] Due Process,[5] and Commerce[6] clauses of the United States Constitution. On August 19 and September 2, 1986, the Court held a full hearing on the merits, consolidating plaintiff's claims for preliminary and permanent injunctive relief pursuant to Fed.R.Civ.P. 65(a)(2). For reasons that follow, Western's claims are dismissed.

DISCUSSION

Western's principle contentions center on three federal aviation statutes: Section 105(a)(1) of the Deregulation Act, 49 U.S.C. § 1305(a)(1) ["Section 1305(a)(1)"]; the Airport & Airway Improvement Act, 49 U.S.C. § 2210 ["Section 2210"]; and the Federal Aviation Act of 1958, 49 U.S.C. § 1349(a) ["Section 1349(a)"]. Section 1305(a)(1) is a preemption statute. It provides:

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or

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[1] 49 U.S.C. §§ 1305(a)(1), 1349(a), 2201 *et seq.*

[2] 42 U.S.C. § 1983.

[3] U.S. Constitution, Art. VI, cl. 2.

[4] U.S. Constitution, Amendment XIV.

[5] *Id.*

[6] U.S. Constitution, Art. I, Sect. 8, cl. 3.

> more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Sections 2210 and 1349(a) respectively require that an airport proprietor receiving federal funds (1) make its facilities available to the public on fair and reasonable terms and without unjust discrimination, and (2) not grant to any air carrier an exclusive right to use the facilities.

Western contends that the perimeter rule violates Section 1305(a)(1) and thus the Supremacy Clause because the rule is a regulation of Western's "routes and services." Western also argues that the rule impermissibly discriminates against Western in violation of the Commerce Clause and Sections 2210 and 1349(a) because it permits flights to Denver but not to Salt Lake City. Finally, Western asserts that the rule places an undue burden on interstate commerce.[7]

The Port Authority argues that Western has failed to state a cause of action. It points to *Montauk-Caribbean Airways v. Hope*, 748 F.2d 91 (2d Cir. 1986), which held that neither Section 1305(a)(1) nor 1349(a) confers a private right of action, and implied the same for Section 2210.[8] Western claims that even if it has no private action

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[7]Western makes no argument with respect to its claims under the Civil Rights Act or the Equal Protection & Due Process clauses and the Court does not consider these claims. See Local Civil Rule 3(b); *see also Midway Airlines v. County of Westchester*, 584 F.Supp. 436, 441 n. 18 (S.D.N.Y.1984).

[8]The Court did not address the issue with respect to Section 2210, but affirmed the district court's dismissal of the claim. It also cited favorably to *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F.Supp. 667, 673 (N.D.Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir.1984). In *Hill Aircraft* the court considered both Section 1349(a) and Section 1718, 49 U.S.C. § 1718, the predecessor to Section 2210. The court

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under the statutes it may still sue to invalidate the perimeter rule under the Supremacy Clause. In this respect, Western maintains, the statutes demonstrate the preemptive force of federal legislation in the area of aviation. The Port Authority responds that such an argument merely circumvents the rule in *Montauk* and, if adopted, would render that decision meaningless.

The Court finds the Port Authority's argument unpersuasive and contrary to the *Montauk* decision itself. In *Montauk,* the plaintiff sought to operate as a fixed-base operator and air carrier on a year-round basis at an airport owned by the Town of East Hampton. Pursuant to a lease with the Town, the plaintiff was limited to seasonal operations. Plaintiff sought to modify the lease but the town denied its request. Plaintiff then challenged the Town's actions both under the federal aviation statutes at issue here and on antitrust grounds.

The district court dismissed the complaint. On appeal, the Second Circuit rejected the claims under the Sherman Act. The court reasoned that N.Y.Gen.Mun.Law § 352, which permits municipal airport operators to enter into exclusive lease arrangements, constitutes a clearly expressed state policy authorizing municipalities to pursue anticompetitive activity. Consequently, the court held, the Town was immune from the antitrust challenge by virtue of the state action doctrine.

The plaintiff then argued that Section 1305(a) preempted state law in this area and thus there was no state authorization for the anticompetitive activity. The court rejected this argument, but on the merits, holding that the Town's actions fit an exception to Section 1305(a) preemption. *See* 784 F.2d at 96–97. The court therefore drew a

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concluded there to be no private right of action under either section. Subsequently, the Eleventh Circuit, which had affirmed the district court's opinion in *Hill Aircraft,* squarely addressed Section 2210, and held there to be no private right of action.

distinction between a Supremacy Clause challenge and a private right of action. *See also New York Airlines v. Dukes County*, 623 F.Supp. 1435 (D.C. Mass. 1984) (distinguishing private cause of action from a Supremacy Clause challenge).

This Court concludes that *Montauk* does not foreclose Western's Supremacy Clause challenge to the extent that it relies on Section 1305(a)(1) preemption. However, the Court finds no support for such a challenge in Sections 1349(a) or 2210. Unlike Section 1305(a)(1), which renders void as preempted any regulation affecting "routes or services" not contemplated by that section, Sections 1349(a) and 2210 merely impose obligations on airport proprietors.[9] Although these sections may have some relevance in demonstrating the extent of federal preemption,[10] Western's

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[9] It is difficult to see how Section 1305(a)(1) could give rise to a cause of action when that section creates no rights or obligations.

[10] The supremacy clause, U.S. Const., art VI, cl. 2, invalidates state laws that "interfere with or are contrary to" federal law. *Gibbons v. Ogden*, 9 Wheat 1, 211, 6 L.Ed. 23 (1824). Congress may preempt state law by an express provision. *Jones v. Rath Packing Co.* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, *reh'g denied*, 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240 (1977). In addition, an intent to preempt state law may be inferred where Congress has enacted a sufficiently comprehensive scheme of federal regulation or where the federal interest is dominant so as to preclude state legislation in the same area. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 280, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947); *see Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Where Congress has not acted to supersede completely regulation by the states, state law is nullified to the extent that it conflicts with federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-43, 83 S.Ct. 1210, 1216-18, 10 L.Ed.2d 248, *reh'g denied*, 347 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963). *See generally Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707, 105

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attempt to establish a violation of these sections amounts to a private right of action, which is not permitted.

Turning to Western's Supremacy Clause challenge, Section 1305(a)(1), as previously noted, establishes federal preemption in the field of "rates, routes and services" of air carriers. The Port Authority's perimeter rule may be fairly characterized as a regulation touching this area and the Port advances no significant arguments to the contrary. The Port does argue that its perimeter rule is nonetheless valid under Section 1305(b)(1), 49 U.S.C. § 1305(b)(1) ["Section 1305(b)(1)"], which provides:

> Nothing is subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

The extent of "proprietary powers and rights" has not as yet been established. The legislative history of Section 1305(b)(1) indicates that the airport proprietor would be permitted to take those actions "presently accepted as valid exercises of proprietary powers." 124 Cong.Rec. 18799 (remarks of Sen. Kennedy). The issue has most frequently arisen in the context of noise regulations.

In *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), the Court struck down a municipal ordinance which imposed a curfew on jet air traffic at a local airport. The Court focused on Section 611 of the Federal Aviation Act, 49 U.S.C. § 1431, which, as the Court put it, represents a "comprehensive scheme of federal control of the aircraft noise problem." *Id.* at 629. The Court ruled the

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S.Ct. 2371, 85 L.Ed.2d 714 (1985).

New York Airlines v. Dukes County, 623 F.Supp. 1435, 1441 (D.C.Mass.1985).

ordinance preempted due to the "pervasive nature of the scheme of federal regulations of aircraft noise." *Id.* at 633. Expressly left open, however, was the question whether there is any limitation on an airport proprietor's ability to regulate noise. *See id.* at 636 n. 14. In this respect, the Court noted a letter by the Secretary of Transportation, quoted with approval in the Senate Report on Section 611, which expressed the view that

> The proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport,* from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

Id. at 635 (emphasis in original).

Several courts that have since considered the viability of the proprietor exception alluded to in *City of Burbank* have held such an exception to exist. *See, e.g., Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100, 103 (9th Cir. 1981); *British Airways Bd. v. Port Authority,* 558 F.2d 75, 83 (2d Cir. 1977). In *British Airways Bd.,* our Court of Appeals upheld the Port Authority's temporary ban on SST flights at Kennedy Airport pending the promulgation of reasonable regulations establishing acceptable noise levels for the airfield. The court relief on the legislative history of Section 611, in particular the history cited to in *City of Burbank,* and concluded that it was Congress' intent to permit proprietor regulations in the field of noise, despite the otherwise total federal preemption in this area.

The court also indicated limits on an airport proprietor's power. It said that the proper domain of the airport proprietor is to establish regulations regarding "the permis-

sible level of noise which can be created by aircraft using the airport." 558 F.2d at 84. In a subsequent decision, *British Airways Bd. v. Port Auth.*, 564 F.2d 1002 (2d Cir. 1977) [*"British Airways Bd. II"*], the court reiterated its conclusion that airport proprietors have an "extremely limited role" in the system of aviation regulation 564 F.2d at 1010.

Western seizes upon the above-quoted language and argues that noise regulation is the only recognized exception to the otherwise total federal preemption of aviation. Although the cited language is quite narrow, *British Airways Bd.* and *British Airways Bd. II* were principally concerned with Section 611, the noise statue, and whether Congress, in enacting that section, intended that airport proprietors be permitted to regulate noise. The cases do not reject the existence of other proprietary interests, but merely seek to insure that when such an interest exists, such as the control of noise, the proprietor not regulate beyond the scope of that interest.[11]

Section 1305(b)(1) does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind. As Judge Weinfeld said in *Midway Airlines v. County of Westchester*, 584 F.Supp. 436 (S.D.N.Y. 1984), "[t]he legislative history is unmistakably clear that Congress did not intend that the preemptive force of 49 U.S.C. § 1305(a)(1) would interfere with 'long recognized powers of the airport operators to deal with noise and other environmental problems at the local level.' " *Id.* at 440 n. 18 (quoting 124 Cong. Rec. 37419 (1978) (remarks of Sen. Kennedy)). Judge Weinfeld interpreted *British Airways II*

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[11]Even in this respect the Second Circuit has recently upheld a regulation which limited the cumulative level of noise exposure at an airport rather than the decibel levels of individual take-offs and landings. *See Globel Int'l Airways Corp. v. Port Authority*, 727 F.2d 246 (2d Cir, 1984).

as holding that airport proprietors may issue reasonable rules pertaining to the permissible level of noise *or other danger* which can be caused by aircraft using the airport. *Id.* at 441. He went on to uphold an airport proprietor's temporary refusal to grant airport access for a reasonable period necessary to "develop rational and nondiscriminatory rules for allocating scarce space and landing and takeoff slots." *Id.* at 440.

In another airport capacity case, *Aircraft Owners & Pilots Ass'n v. Port authority,* 305 F.Supp. 93 (E.D.N.Y.1969), Judge Dooling upheld the Port Authority's imposition of a "takeoff" fee on certain small aircraft for the purpose of reducing airport congestion. The court specifically noted that the fee was imposed to divert air traffic during the busiest periods of the day but recognized this as a legitimate basis for regulation.

As these cases make plain, although questions of permissible noise regulation predominate in the courts, other proprietor-imposed regulations are "presently accepted as valid exercises of proprietary powers." A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest.

In *City of Houston v. FAA,* 679 F.2d 1184 (5th cir. 1982), the court considered a 1000-mile perimeter rule imposed by the FAA at Washington National Airport ["National"]. The FAA owns both National and Dulles International Airport. For reasons markedly similar to those of the Port Authority, the FAA imposed its perimeter restriction.

The Fifth Circuit upheld the rule. It first noted that section 1305(a)(1), which preempts state regulation, does not restrict the powers of the FAA, an arm of the federal

government. The court then proceeded to decide the case on alternative grounds. Although holding that the FAA had power to impose a perimeter based on its authority under the Federal Aviation Act alone, it also held, as an independent ground, that the FAA's proprietary interest was sufficient to justify the rule. The court implied that the result might have been different had the proprietor not been the FAA, and cited to the Second Circuit's language in *British Airways Bd. II* that airport proprietors have an "extremely limited role" in aviation management. Nonetheless, the court carefully distinguished Pacific Southwest Airlines v. County of Orange, No. CV 81-3248 (C.D.Cal. Nov. 30, 1981), a case which held that a local airport proprietor could not impose a 500-mile perimeter rule, saying: "A local airport with no connection to nearby Los Angeles International or Ontario Airports, [the proprietor] could not blithely take such an action upon itself." *Id.* at 1194.

Here, as in *City of Houston,* there is in issue a multi-airport system. The effect of the perimeter rule in each case is to divert air traffic from one airport to another within the respective systems, and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter. This court sees no real distinction between the FAA's interest, as proprietor of an airport system, to manage its congestion problems by use of a perimeter rule, and the interest of the Port Authority, as proprietor of LaGuardia, Kennedy, and Newark, to do the same.

Of course, the FAA, acting as airport proprietor, is likely to promulgate rules that are compatible with the overall scheme of federal regulation. This factor undoubtedly played a role in the *City of Houston* decision. However, no aspect of federal aviation is more heavily regulated than the field of noise and yet in this area local limitations are permitted. The Second Circuit in *British Airways Bd.* evaluated the reasons for permitting a proprietor to reg-

ulate noise. It first noted that airport proprietors are liable for compensable takings resulting from unreasonable airport use and therefore should have the ability to protect themselves. 558 F.2d at 83. The court went on to say "[i]t is perhaps more important ... that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access." *Id.* This reasoning applies with equal force to the control of ground congestion. The court in *City of Houston* recognized a legitimate proprietary function. This Court concludes that, in the absence of conflict with FAA regulations,[12] a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor.

This does not end the inquiry, however, for as the Second Circuit has instructed in *British Airways Bd.*, 558 F.2d at 84-85, and again in *British Airways Bd. II*, the airport operator is circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest. The Court must "carefully scrutinize all exercises of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." *British Airways Bd. II*, 564 F.2d at 1011.

The Court first dispenses with Western's claim that the perimeter rule unreasonably discriminates against Western. Western contends that permitting flights to Denver, while not allowing nonstop flights to places such as Salt Lake City, discriminates against all air carriers with hubs

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[12]Although the FAA has imposed High Density Regulations to reduce air traffic at LaGuardia, Western points to no conflict between these regulations and the perimeter rule. *Cf. Globel Int'l Airways Corp. v. Port Authority*, 727 F.2d 246 (2d Cir.1984) (noise regulation).

beyond the 1500-mile point. Western points out that its major competitors, which operate from LaGuardia, use a Denver hub and thus Western is unable to compete effectively with these airlines. Western does not argue that the Denver exception was created with the purpose of favoring certain airlines, and has offered no evidence which would tend to show that the "grandfathering" of Denver was in any other way improper. From Western's point of view, therefore, it would have been no different had the perimeter rule been set at 1700–miles, thereby encompassing Denver.

As the court in *City of Houston* said in a somewhat different context but in terms no less applicable here:

> The accident of geography, not any deliberate discrimination against the western states, underlies the FAA's rule. The perimeter does not discriminate against a named state or states. It does not declare that Texans may not fly nonstop to National. Rather, it sets a limit of 1000 miles on nonstop flights. Some states, e.g. Louisiana, straddle the line. Some Louisiana airports meet the requirement, others do not. Just as the Rocky Mountain states possess beautiful scenery, Texas its reservoirs of oil and natural gas, and California its sandy beaches, so the accident of geography places some states within 1000 miles of National and others beyond. The perimeter rule, . . . for geographic reasons has an incidental effect on air travel from certain states.

679 F.2d at 1198.

In truth, all regulations tend to discriminate in some way, *see, e.g., Global Int'l Airways v. Port Authority,* 727 F.2d 246 (2d Cir. 1984); *Aircraft Owner's & Pilots Ass'n v. Port Authority,* 305 F.Supp. 93 (E.D.N.Y.1969). The critical inquiry is whether that discrimination is unjust; or to put it another way, whether the discrimination is rea-

sonable in light of the legitimate objectives sought to be achieved.

On the issue of reasonableness, as previously discussed, the Port Authority implemented the perimeter rule to reduce groundside congestion and maintain LaGuardia as a short and medium haul airport, and an airport catering to business customers. The Post believes that opening LaGuardia to long range aircraft, and with it the leisure traveler, would reduce runway capacity, increase delays, result in increasing congestion at the gates, place a heavier demand on ticketing, baggage claim facilities and public areas, increase use of parking lot facilities and cause roadway and terminal frontage access to become more congested. In the Port's view, the short haul or business traveler moves more quickly through the airport with less luggage and fewer "meters and greeters". It is for similar reasons that the FAA imposed a perimeter at National Airport. *See City of Houston,* 679 F.2d 1184.

A brief survey of the evidence shows that the Port's conclusions are not unfounded. In 1984 the Port authority staff commenced an evaluation of the perimeter rule. Included in this evaluation was a study of LaGuardia's capacity. The study concluded that at "current traffic levels LaGuardia Airport is operating near or above its capacity in major components of the airport system including CTB apron area and certain passenger processing areas, departure roadway and access roadways, during peak periods. The delays and congestion which are currently being experienced during these periods are symptomatic of this condition." Defendant Ex. D, Attachment III at 11. Similarly, a study performed on the LaGuardia airside capacity concluded that "[d]espite the constant near-capacity utilization, LaGuardia does experience hours when traffic exceeds the airport capacity by as much as 23 percent." Defendant Ex. D, Attachment II at 3. Another study observed that LaGuardia "is fast approaching saturation in many areas, with ground access the major constraint. . . .

[A]dditional passenger growth can be expected." *See Ex.* D, Attachment I at 2.

At the hearing, Mr. George Howard, the Port authority's Assistant Director for Aviation, testified that elimination of the rule would result in an increase of 1.5 million passengers, including a higher percentage of long haul passengers. The result would be more use of parking lot and baggage handling facilities as well as greater congestion at the terminal. Tr. at 91. According to the staff study, it was anticipated that some 27 daily roundtrip flights to Los angeles, San Francisco, Seattle, San Diego, San Juan, Bermuda, Calgary, Nassau and St. Croix would likely be introduced at LaGuardia if the perimeter rule were discarded. *See* Defendant Ex. C at 10.

The Port Authority staff also circulated questionnaires to airlines, the FAA, the Department of Transportation and the State Department. The questionnaires sought comment on four possible alternatives for the perimeter rule: (1) retention of a 2000-mile policy; (2) imposition of a 1500-mile rule; (3) imposition of a 1500-mile rule with continued service to cities currently served; and (4) imposition of a 1000-mile rule. The majority of those responding favored retention of some form of perimeter restriction. *See* Plaintiff Ex. 16.

The staff ultimately recommended a 1500-mile rule. Its report notes that about 20 percent of the survey respondents favored a 1500-mile rule with most of the group favoring continuing service to cities currently served. The report concluded:

> After assessing the survey results and the objections raised by respondents, staff affirms its tentative conclusion that the interests of the public and the airlines are best served by the continuation of some type of perimeter policy, particularly in view of the limited physical facilities and other inherent limitations of LaGuardia Airport and the larger capacities at Ken-

> nedy International and Newark International Airports. However, in view of the concerns expressed by the State Department and suggestions by several carriers and other parties for modification of the rule, staff recommends that the current interim rule be modified by reducing the mileage radius from 2,000 statute miles to 1,500 statute miles but allowing the continuation of service to Denver, expand the current policy to permit non-stop flights to such Canadian cities as Winnipeg which already have preclearance facilities as well as to other Canadian cities within 1,500 statute miles of LaGuardia which may acquire preclearance facilities in the future This would exclude Calgary which is beyond 1,500 statute miles and where although service was recently instituted the stipulation entered into by the parties gives Air Canda no vested rights.

Defendant Ex. A at P-3.

Western contends that the rule does not achieve its purpose and that reducing the perimeter to 1500 miles was a purely arbitrary act.[13] However, the Port Authority conducted a careful study and review of its policy and concluded that a 1500-mile rule was necessary to meet increasing congestion problems. It is important to keep in mind that at the time of the study, which reflected increasing airport use, there was already in place an informal 2000-mile perimeter. Survey results indicated that the majority of those responding favored some form of perimeter policy and 20 percent favored a 1500-mile rule. In setting in place a formal rule, therefore, and in light of

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[13]To the extent Western argues that the Port Authority should have created an exception for Western in light of the fact that the market Western seeks to serve is compatible with the Port Authority's designs for LaGuardia, Western should seek relief pursuant to Sections 1349(a) and 2210. In this respect Western's remedy is with the FAA. *See Montauk)Caribbean Airways v. Hope,* 784 F.2d 91 (2d Cir.1986).

the prospect of ever burgeoning traffic at LaGuardia, it was not unreasonable to impose a 1500-mile limit. This is especially true when access to the New York area remains unimpeded at the other area airports.

> As Justice Holmes once remarked: when a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself, without regard to the necessity behind it, the line or point seems arbitrary. It might as well, or nearly as well, be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 41, 48 S.Ct 423, 426, 72 L.Ed. 770, 775 (1928) (Holmes, J., dissenting), *quoted in City of Houston,* 679 F.2d alt 1193. Although Western contends that there were other means available to reduce the congestion problem, this Court will not second guess the actions of the Port Authority as long as they are reasonable. The Court finds them to be so in the instant case.[14]

CONCLUSION

For the foregoing reasons, Western's claims for preliminary and permanent injunctive relief are dismissed. Fed.R.Civ.P. 65(a)(2). The Clerk of the Court is directed

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[14]The Court notes Western's objection to the introduction of Defendant's Exhibits B and F. Although these exhibits were received for nonhearsay purposes, the Court did not rely on them in any event.

to enter judgment for the defendant and dismiss the complaint.

SO ORDERED.

Appendix B

WESTERN AIR LINES, INC.,
Plaintiff-Appellant,
v.
PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,
Defendant-Appellee,

No. 829, Docket 86-7859.

United States Court of Appeals,
Second Circuit

Argued Feb. 19, 1987

Decided April 22, 1987.

Allyn O. Kreps, Los Angeles, Cal. (Jones, Day, Reavis & Pogue, William T. Drescher, Robert DeBerardine, Robert Layton, Thomas L. Abrams, Jones, Day, Reavis & Pogue, New York City, of counsel), for plaintiff-appellant.

Arthur P. Berg, Atty., The Port Authority of New York and New Jersey, for defendant-appellee.

Before FEINBERG, Chief Judge, TIMBERS and PRATT, Circuit Judges.

FEINBERG, Chief Judge:

Western Air Lines, Inc. (Western) appeals from a judgment of the United States District Court for the Southern District of New York, after a bench trial before John M. Cannella, J., that dismissed its complaint seeking an injunction.—F.Supp.—(S.D.N.Y.1986). Western argues that a "perimeter rule," promulgated by the Port Authority of New York and New Jersey (the Authority), is preempted by a provision of the Airline Deregulation Act, 49 U.S.C.

§ 1305(a)(1) and violates the substantive provisions of two other aviation statutes, 49 U.S.C. §§ 1349(a) and 2210(a). Western also appeals from the dismissal of its claims for enforcement of the aviation statutes under 42 U.S.C. § 1983. Substantially for the reasons stated by the district court, we affirm the dismissal of the complaint.

Background

The Authority owns and operates LaGuardia, Kennedy International and Newark International Airports. In order to reduce ground congestion at LaGuardia, by far the smallest of the three airports, the Authority uses a perimeter rule. The current rule prohibits, with certain exceptions, non-stop flights to or from LaGuardia in excess of 1500 miles. The Authority believes that business travelers create considerably less airport congestion than vacationers and uses the perimeter rule to encourage the use of LaGuardia by business people, who often make relatively short trips, and the use of Newark and Kennedy for vacation flights.

The Federal Aviation Administration (the FAA) limits flights to and from LaGuardia through the use of "slots," each of which authorizes one landing or takeoff by the holder during a thirty-minute period. Western obtained several slots at LaGuardia as a result of a lottery conducted by the FAA. Western sought to use these slots for three daily non-stop flights in each direction between LaGuardia and Salt Lake City, where Western has a "hub." A hub is an airport used by an airline as the central point of its connecting flights. Airlines use hubs to connect two cities that cannot be served economically by non-stop flights. On the basis of its perimeter rule, however, the Authority refused Western permission to conduct LaGuardia-Salt Lake City operations, since Salt Lake City is more than 1,500 miles from LaGuardia.

In the district court, Western's effort to enjoin the perimeter rule centered on three federal aviation statutes:

49 U.S.C. § 1305, which limits local authority to regulate airlines' "rates, routes of services."[1] 49 U.S.C. § 2210(a), which requires an airport proprietor receiving federal funds to make its facilities available on a reasonable and nondiscriminatory basis,[2] and 49 U.S.C. § 1349(a), which pro-

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[1]49 U.S.C. § 1305 provides in relevant part:

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

. . . .

(b) Proprietary powers and rights

(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

[2]49 U.S.C. § 2210 provides, in relevant part:

(a) Sponsorship

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and combined passenger and cargo flights or all cargo flights,and such classification or status as tenant shall

hibits such proprietors from granting exclusive access to any airline.[3] Western claimed that there is an implied private right of action under each statute; Western also relied on 42 U.S.C. § 1983. Western also claimed that under the

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not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on tenant air carriers, and (B) each fixed-based operator at any airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport utilizing the same or similar facilities, and (C) each air carrier using such airport shall have the right to service itself or to use any fixed-base operator that is authorized by the airport or permitted by the airport to serve any air carrier at such airport.

[3] 49 U.S.C. § 1349 provides, in relevant part:

(a) No Federal funds, other than those expended under this chapter,shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Secretary of Transportation that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Secretary of Transportation, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended. For purposes of the proceeding sentence, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

Supremacy Clause, the perimeter rule was preempted by section 1305(a)(1).

The district court, relying on our holding in *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir.), cert. denied, —— U.S. ——, 107 S.Ct. 248, 93 L.Ed.2d 172 (1986), ruled that the statutes relied on by Western do not provide a private right of action. In addition, the court dismissed Western's claims under section 1983 for lack of prosecution. The district court did find that Western could assert its preemption claim based on the Supremacy Clause. On the merits, however, it found that the Authority's perimeter rule was not preempted by section 1305.

Discussion

In *Montauk-Caribbean*, we held that there are no implied private rights of action to enforce sections 1349(a) and 1305(a). 784 F.2d at 97–98. We are, of course, bound by that decision, fairly construed. The district court correctly recognized that our analysis in *Montauk-Caribbean* applies equally to a suit claiming an implied right of action to enforce section 2210(a).[4] See also *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 14–16 (1st Cir.1987); *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489, 1490–91 (11th Cir.1985). We also held in *Montauk-Caribbean* that sections 1305(a) and 1349(a) cannot be enforced through section 1983. 784 F.2d at 98. That holding would require dismissal of Western's section 1983 claims with respect to sections 1305(a) and 1349(a) in this case. We need not decide, however, whether there is a persu-

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[4]Indeed, the district court decision in *Montauk-Caribbean*, which this court affirmed, concluded that section 2210(a) does not provide a private right of action. See *Montauk-Caribbean Airways, Inc. v. Hope*, No. 85-CV-420, slip op. at 10—11 (E.D.N.Y.Sept. 4, 1985), aff'd, 784 F.2d 91 (2d Cir.), cert, denied, —— U.S. ——, 107 S.Ct. 248, 93 L.Ed.2d 172 (1986).

asive basis for reaching a different conclusion with respect to section 2210(a), see *New York Airlines, Inc. v. Dukes County,* 623 F.Supp. 1435 at 1443–48 (D.Mass.1985), because Judge Cannella did not abuse his discretion in holding that Western did not press its section 1983 claims in the district court.

Despite the lack of a private right of action to enforce the statutes, the district court held that Western could bring a Supremacy Clause challenge to the perimeter rule by claiming that the rule is preempted by section 1305(a)(1). The Authority argues that the absence of a private right to enforce section 1305(a)(1) requires dismissal of Western's Supremacy Clause claim. The Authority argues that *Montauk-Caribbean* settles the issue because the preemption claim based directly on section 1305(a)(1) that the *Montauk-Caribbean* court refused to recognize implicitly relied on the Supremacy Clause. The Authority also argues that as a general matter, the Supremacy Clause by itself cannot create a right of action. Although we recognize the potential anomaly of rejecting a private right of action to enforce a statute while allowing a claim under the Supremacy Clause that the statute preempts a local regulation, we find that Western properly brought its Supremacy Clause claim.

As a preliminary matter, we note that whether the Supremacy Clause will support a suit claiming that section 1305(a)(1) preempts a local regulation was not ruled upon in *Montauk-Caribbean.* The plaintiff in that case made no claims directly under the Supremacy Clause.[5] Our holding that a private party has no implied right of action to enforce the substantive provisions of section 1305(a)(1) did not decide whether a private party can allege that a local

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[5]Indeed, plaintiff's petition for rehearing conceded that its prior argument "may not have adequately emphasized ... the Supremacy Clause."

regulation is preempted by section 1305(a)(1) on Supremacy Clause grounds.

A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law. "The primary function of the Supremacy clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments. . . ." *White Mountain Apache Tribe v. Williams,* 810 F.2d 844, 848 (9th Cir.1987). A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity. In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law. It provides remedies, frequently including damages, for violations of federal law by a government entity or by a private party. The mere coincidence that the federal law in question in this case contains its own preemption language does not affect this distinction.

For example, in *Rollins Environmental Services (FS), Inc. v. Parish of St. James,* 775 F.2d 627 (5th Cir.1985), plaintiff's Supremacy Clause claim was based on a provision of the toxic Substance Control Act, 15 U.S.C. §§ 2601–2629, that like section 1305(a)(1), explicitly preempts certain state regulation. See 15 U.S.C. § 2617. Even though the section of the Act providing private rights of action did not provide for suit for violation of the preemption section, see 15 U.S.C. § 2619, the court, relying on the Supremacy Clause, considered the effect of the preemption provision. *See Rollins,* 775 F.2d at 631, 632–37. Similarly, in *New York Airlines Inc. v. Dukes County,* 623 F.Supp. at 1441–43, 1450 n. 13, the court held that section 1305(a)(1) provides a basis for a Supremacy Clause challenge to an airport regulation, but that it does not provide a private right of action.

In arguing that the Supremacy Clause does not provide a cause of action, the Authority mistakenly relies on *White Mountain Apache Tribe v. Williams,* 798 F.2d 1205 (9th Cir.1986), cert. denied, —— U.S. ——, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).[6] In that case, the court distinguished actions for an injunction based on the Supremacy Clause from private rights of action to enforce the Supremacy Clause under section 1983:

> The question whether the Supremacy Clause (U.S.Const. art. VI cl. 2) may be used as a sword in bringing a § 1983 action is, of course, different from that decide [in the affirmative] by the Supreme Court in [*White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)]—whether the Supremacy Clause may be invoked as a shield against the imposition of state taxes on . . . operations heavily regulated by the federal government.

810 F.2d at 847. The court held that although the Supremacy Clause can be used to enjoin enforcement of a state statute that runs afoul of a federal legislative scheme, it does not provide a basis for a claim under section 1983. Thus, *White Mountain* highlights the distinction between a Supremacy Clause claim and other private rights of action. See also *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk,* 604 F.Supp. 1084, 1089–91 (S.D.N.Y.1985), aff'd, 813 F.2d 570 92d Cir.1987) (per curiam). Indeed, many courts have considered Supremacy Clause challenges to local airport regulations without determining whether there was a private right of action from another source. See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); *Pirolo v. City of Clearwater,* 711 F.2d 1006

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[6]The Ninth Circuit withdrew this version of its opinion and replaced it with an amended opinion, *White Mountain Apache Tribe v. Williams,* 810 F.2d 844 (9th Cir.1987). The portions of the Ninth Circuit's opinion relevant to this appeal, however, were substantially unchanged.

(11th Cir.1983). Accordingly, the district court was correct in examining Western's Supremacy Clause claim.

Turning to the merits, we affirm on the basis of Judge Camella's well-reasoned opinion, to which we refer the reader, holding that the Authority's perimeter rule is not preempted by section 1305. Although, as Judge Cannella recognized, the perimeter rule may be a regulation "relating to . . . routes" within the meaning of section 1305(a)(1), we agree with his conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls within the proprietary powers of airport operators exempted from preemption by section 1305(b)(1). Cf. *City of Houston v. FAA*, 679 F.2d 1184, 1196 (5th Cir.1982).

Western's other contentions require little discussion. In its reply brief on appeal Western argues, apparently for the first time, that the FAA, by granting slots, has preempted any regulation of those slots by the Authority. The statute, however, authorizes the Authority to regulate those slots in accordance with its proprietary powers. Since the district judge did not err in finding that the perimeter rule is within those proprietary powers, Western's contention fails. Western's remaining claims, that it was improperly denied an opportunity to cross-examine the Authority's witness at trial and that it is entitled to a new trial because the district court made inadequate findings of fact and conclusions of law, are without merit.

Accordingly, the judgment of the district court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of May one thousand nine hundred and eighty-seven.

WESTERN AIR LINES, INC.,
Plaintiff-Appellant,

V

PORT AUTHORITY OF NEW YORK and NEW JERSEY,
Defendant-Appellee.

Docket No. 86-7859

A petition for rehearing containing a suggestion that the action be reheared in banc having been filed herein by counsel for the Appellant WESTERN AIR LINES INC.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk

No. 87-333

Supreme Court, U.S.
FILED
OCT 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Port Authority of New York and New Jersey operates the three major airports in the New York City area, LaGuardia Airport, Kennedy International Airport and Newark International Airport. In order to reduce ground congestion at LaGuardia, by far the smallest of these airports, the Port Authority enacted a "perimeter rule" prohibiting non-stop flights to or from LaGuardia in excess of 1500 miles.

Section 105(a)(1) of the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978, prohibits any state or interstate agency from enacting rules "relating to rates, routes, or services of any air carrier . . . ." but Section 105(b)(1) of the Act specifically provides that "[n]othing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport . . . to exercise its proprietary powers and rights." Pub. L. No. 95-504, §4(a), 92 Stat. 1705, 1708 (1978), codified at 49 U.S.C. app. 1305(a)(1), 1305 (b)(1).

The question presented is whether the court of appeals correctly determined that the LaGuardia perimeter rule falls within the "proprietary powers and rights" of the Port Authority specifically reserved by Section 105(b)(1).

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STATUTES:

Federal Aviation Act of 1958 as amended by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705:

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§105(a)(1), 49 U.S.C. app. 1305(a)(1) ..... *passim*
§105(b)(1), 49 U.S.C. app. 1305(b)(1) ..... *passim*

49 U.S.C. app. 1349(a) 4

49 U.S.C. app. 2210(a) 4

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No. 87-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-27a) is reported at 817 F.2d 222. The opinion of the district court (Pet. App. 1a-18a) is reported at 658 F.Supp. 952.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987 (Pet. App. 19a). The court of appeals denied the appellant's petition for rehearing on May 28, 1987 (Pet. App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the petition at 2-3.

STATEMENT

Pursuant to a Congressionally-consented-to Compact between the states of New York and New Jersey and bi-State legislation amendatory and supplemental thereto, including bi-State Air Terminal legislation, N.Y. Unconsol. Laws § 6631 *et seq.* (McKinney 1979 and Supp. 1986); N.J.S.A. 32:1-35.1 *et seq.* (West 1963 and Supp. 1986), The Port Authority of New York and New Jersey (hereinafter "Port Authority") operates the three major airports in the New York City area: Kennedy International Airport, LaGuardia Airport and Newark International Airport. The Port Authority also owns Teterboro Airport which is operated on its behalf by Pan American Airways. Of the three major airports operated by the Port Authority, LaGuardia is the smallest with 662 acres. By comparison, Newark is nearly four times larger with 2300 acres and Kennedy is more than seven times larger with 4930 acres (Pet. App. 2a).

In enacting the Port Authority's air terminal legislation, both States specifically noted that air service is a "regional and interstate problem" and encouraged the "integration of such air terminals as far as practicable in a unified system." (N.Y. Unconsol. Law §6631 (McKinney 1979); N.J.S.A. 32:1-35.1 (West 1963). In order to control airport congestion at LaGuardia, and pursuant to its statutory mandate to operate its airports as a unified system, the Port Authority since the 1950's had an informal perimeter policy at LaGuardia. That policy, which

essentially restricted non-stop operations to domestic airports within 2,000 miles of LaGuardia (Pet. App. 2a), was adhered to by all of the carriers operating at LaGuardia for nearly thirty years. In 1984, after Air Canada threatened to violate the perimeter policy, the Port Authority conducted a comprehensive study of the present day need for a perimeter rule. In the course of its study, the Port Authority solicited the views of the airlines, as well as the Federal Aviation Administration, the Department of Transportation, the State Department and other interested parties (Pet. App. 15a). Significantly, most of the airlines which responded were in favor of the rule and none of the federal agencies took issue with the Port Authority's power to implement such a rule (*Id.*).

On September 13, 1984, based on the study, the Port Authority Commissioners adopted a formal Perimeter Rule for LaGuardia Airport, effective November 1, 1984. The Rule limits airline operations, except operations on Saturday when congestion is not a problem, to non-stop flights to and from points that are located within 1,500 miles of the airport (Pet. App. 15a, 20a).[1] The purpose of the rule is to reduce congestion at the airport by catering to business customers and maintaining the airport for short and medium haul flights which place a lesser burden than long distance flights on LaGuardia's restricted physical facilities, such as parking lots, baggage handling, and terminals. (Pet. App 14a).

The Federal Aviation Administration ("FAA") limits the number of flights during peak hours in and out of LaGuardia, a "high density traffic airport", through the granting of "slots". 14 C.F.R. 93.123 (1987). Each slot authorizes one landing or takeoff by the holder at the airport during a thirty minute period (Pet. App. 20a). The FAA does not require that an airline use

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[1] The only exception to the 1,500 mile rule is for operations to and from Denver which is approximately 1,638 miles from LaGuardia. Service to Denver was "grandfathered" because of the existence of continuous non-stop service between LaGuardia and Denver (Stapleton Airport) since October 1981 and because the service constituted a significant portion of LaGuardia operations (Pet. App. 2a).

the slots for any particular service to any particular destination. As a result of a lottery conducted by the FAA, Western obtained various slots at LaGuardia in March of 1986 (Pet. App. 20a). In May of 1985 and again in early 1986, Western Air Lines, Inc. ("Western")[2] sought permission from the Port Authority to conduct operations between LaGuardia and Salt Lake City which is almost 2000 miles from New York (Pet. App.3a). In both instances, the Port Authority denied permission based on its perimeter rule (Pet. App. 3a). At the time of the district court's decision, Western served Salt Lake City with two daily round-trip flights at Kennedy (Pet. App. 3a).

In August of 1986, Western commenced this suit in district court alleging, *inter alia*, that the perimeter rule violates various federal aviation statutes and the Civil Rights Act of 1871. It also alleged that the rule was invalid under the Supremacy, Due Process, Equal Protection and Commerce Clauses of the United States Constitution (Pet. App. 3a). After denying Western's request for a temporary restraining order, the court held a full hearing on the merits, consolidating, with the consent of all parties, Western's claims for preliminary and permanent injunctive relief (*Id.*).

On September 3, 1986, in a comprehensive opinion, the district court denied Western's application for preliminary and permanent relief and ordered that the complaint be dismissed.[3] After reviewing the applicable legislative history and

[2] The petition in this Court was filed by Delta Air Lines, Inc. as the surviving corporation of a merger between Western Air Lines, Inc. and Delta Air Lines Inc. (Pet. ii).

[3] Initially the district court rejected Western's argument that Congress intended that private rights of action would lie to enforce the Deregulation Act, 49 U.S.C. app. 1305(a)(1), the Federal Aviation Act of 1958, 49 U.S.C. app. 1349(a), as well as the Airport and Airway Improvement Act, 49 U.S.C. app. 2210(a). However, the court did find that the Supremacy Clause gave Western the power to sue in order to enforce the preemptive effect of 49 U.S.C. app. 1305(a)(1) (Pet. App. 3a-7a).

case law, the court held that the perimeter rule was not preempted by Section 1305(a)(1) reasoning that:

> "A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest."(Pet. App. 10a).

In rejecting the preemption challenge, the court also relied on the Fifth Circuit's decision upholding the perimeter restrictions implemented by the FAA at National Airport. *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). While recognizing that the court in *City of Houston* held that the preemption provision of 49 U.S.C. app. 1305(a)(1) would not restrict the FAA as an arm of the federal government, and that the FAA had the power to impose a perimeter rule based on its authority under the Federal Aviation Act alone, the district court noted that, as an independent ground, the Fifth Circuit also relied on the FAA's power, as proprietor of the airport, to enact perimeter restrictions (Pet. App. 10a-11a).

Finally, in upholding the validity of the perimeter rule,[4] the district court found reasonable the Port Authority's conclusions, supported by the evidence adduced at trial, that:

> "opening LaGuardia to long range aircraft, and with it the leisure traveler, would reduce runway capacity,

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[4] The court first dispensed with Western's claim that by permitting flights to Denver – a city used as a hub by competing airlines – the perimeter rule discriminated against carriers like Western with hubs further from LaGuardia than the 1,500 mile limit. The court found that, as was the case with the FAA's perimeter rule, " '[t]he accident of geography, not any deliberate discrimination against the western states, underlies the . . . rule.' " (Pet. App. 13a quoting, *City of Houston v. FAA*, 679 F.2d at 1198).

> increase delays, result in increasing congestion at the gates, place a heavier demand on ticketing, baggage claim facilities and public areas, increase use of parking lot facilities and cause roadway and terminal frontage access to become more congested. In the Port's view, the short haul or business traveler moves more quickly through the airport with less luggage and fewer 'meters and greeters'. It is for similar reasons that the FAA imposed a perimeter at National Airport. *See City of Houston*, 679 F.2d 1184." (Pet. App. 14a).

The court also rejected Western's argument that reducing the perimeter from 2,000 miles to 1,500 miles was arbitrary action on the part of the Port Authority. The court reasoned:

> "[T]he Port Authority conducted a careful study and review of its policy and concluded that a 1,500-mile rule was necessary to meet increasing congestion problems. It is important to keep in mind that at the time of the study, which reflected increasing airport use, there was already in place an informal 2000-mile perimeter. Survey results indicated that the majority of those responding favored some form of perimeter policy and 20 percent favored a 1500-mile rule. *In setting in place a formal rule, therefore, and in light of the prospect of ever burgeoning traffic at LaGuardia, it was not unreasonable to impose a 1,500-mile limit. This is especially true when access to the New York area remains unimpeded at the other area airports.*" (Pet. App. 16a-17a) (emphasis supplied).

In a unanimous opinion, the Second Circuit (Feinberg, C.J.) affirmed the district court's opinion in all respects. On the merits, the court affirmed on the basis of the district court's "well-reasoned opinion" (Pet. App. 27a). The court noted that while "the perimeter rule may be a regulation 'relating to . . . routes' within the meaning of section 1305(a)(1), we agree with [the district court's] conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls

within the proprietary powers of airport operators exempted from preemption by section 1305(b)(1)" (Pet. App. 27a, citation omitted). The court also rejected Western's claim raised "apparently for the first time" on appeal, "that the FAA, by granting slots, has preempted any regulation of those slots by the Authority" (Pet. App. 27a). The court noted that Section 1305(b)(1) "authorizes the Authority to regulate those slots in accordance with its proprietary powers" and the perimeter rule is an appropriate exercise of those powers (Pet. App. 27a).

The panel denied Western's petition for rehearing and no judge requested a vote on the suggestion that rehearing be held *en banc* (Pet. App. 28a).

ARGUMENT

The court of appeals has correctly resolved the narrow issue of statutory interpretation involved in this case, and its decision does not conflict with any decision of this Court or that of any other court of appeals. Therefore, further review by this Court is not warranted.

1. Petitioner argues that the decision below interferes with federal control over aviation matters and expands the scope of the "proprietary powers" exception beyond Congress' original intent (Pet. 10). Petitioner's argument finds no support in the decisions on which it relies. In fact, quite to the contrary, the federal courts have repeatedly recognized that the power of an airport proprietor to regulate access to its airport and to protect the airport environment has not been preempted by federal legislation.[5]

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[5] The Air Transport Association of America (ATA), which has filed an amicus brief in support of the petition, does not attempt to construct a conflict between the decision below and any other decisions rendered by this Court or by the courts of appeals. Indeed, it mentions that the extent of airport operator's proprietary powers has not been precisely defined (Br. at 7). Instead, the ATA argues that "this Court should grant the petition herein and abort an *emerging, judicially created* conflict between [Section 1305's] two subsections" (Br at 8, emphasis supplied in part). This brief will show that (*infra* at 12-15), contrary to ATA's argument, the decision below creates no conflict between subsection (a) and subsection (b) of Section 1305.

a. In support of its argument, petitioner first attempts to construct a conflict, albeit in approach, between the decision below and this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (Pet. 10-11). *City of Burbank*, however, did not involve a rule adopted by an airport proprietor as landlord, but rather involved an ordinance enacting a curfew on jet takeoffs adopted by the City, which did not own or operate the airport, pursuant to its police power. Although this Court found that the rule was preempted by the pervasive nature of federal control over "air traffic flow" (411 U.S. at 639), this Court explicitly refrained from considering "what limits, if any, apply to a municipality as a proprietor." 411 U.S. at 635 n.14.

The legislative history of the Deregulation Act demonstrates in unequivocal terms that the preemptive effect of Section 105(a)(1) was not intended to limit the "long recognized powers of airport operators to deal with noise *and other environmental problems at the local level.*" 124 Cong. Rec. 37419 (1978) (remarks of Sen. Kennedy) (emphasis supplied). As the district court below stated, "*[a] proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager* (Pet. App. 10a)(emphasis supplied).[6] Contrary to petitioner's contention, this

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[6] In fact, in considering the Airport and Airway Improvement Act of 1980, Congress acknowledged that reducing airport congestion was a valid airport proprietor's right. In its report on the legislation (H.R. 6721), the House Committee on Public Works and Transportation stated on the issue of whether local authorities had the power to impose access restrictions for airports:

> "*In the Committee's opinion it would not be unjust, discriminatory, unfair or unreasonable, or violate any other law or regulation or Federal grant agreement for an airport proprietor to deny access* to a new carrier or additional operations by an existing carrier in a primary hub area *where access to the area is provided for by another air carrier airport in that hub* which holds itself out to accept the new carrier or the additional operations of the existing carrier on substantially the same terms as it applies to other air carriers." H.R. Rep. No. 96-887, Part 2, 96th Cong.2d Sess. 15-16 (1980) (emphasis supplied).

holding is consistent with decisions rendered both before and after this Court's decision in *City of Burbank* which have held that airport proprietors have the authority, as local managers of the airport, to control airport access and to protect the "human environment" surrounding the airport (*Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100, 104 n.5 (9th Cir. 1981)).

For example, courts have acknowledged that airport proprietors have an important role to play in controlling noise levels of planes in and around the airport and, therefore, may enact reasonable noise control regulations. *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981); *Global International Airways Corp. v. Port Authority of New York and New Jersey*, 727 F.2d 246 (2d Cir. 1984); *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977), *on remand*, 437 F. Supp. 804 (S.D.N.Y. 1977), *aff'd*, 564 F.2d 1002 (2d Cir. 1977); *National Aviation v. City of Hayward, Cal.*, 418 F. Supp. 417 (N.D. Cal. 1976). Other cases have recognized the power of airport proprietors to regulate airport capacity as a means of controlling airport congestion. *Midway Airlines v. County of Westchester*, 584 F. Supp. 436 (S.D.N.Y. 1984) (upholding airport operator's authority to deny access to airline in an airport already filled to capacity in order to allow operator time to develop reasonable rules to allocate airport space and landing and takeoff sl[illegible]); *Aircraft Owners & Pilots Association v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969) (upholding the Port Authority's imposition of a minimum flight fee on general aviation during peak hours as a means of reducing airport congestion). [7]

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[7] The ATA, citing a letter written in 1979 by the General Counsel of the CAB to the Director of the San Francisco Airports Commission, appears to argue that airport proprietors have no role to play in regulating airline access to overly crowded airports. In that letter, the CAB General Counsel expressed reservations about the method chosen by the Commission to restrict the use of San Francisco International Airport by new airlines not currently serving the airport. However, in that letter, the CAB General Counsel did not state that local authorities had no power to enact measures restricting access to the airport and, in fact, invited the Commission to reconsider the resolution

(Footnote continued)

b. Equally unconvincing is petitioner's contention that the decision below conflicts with the Ninth Circuit's decision in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (Pet. 11-12). In that case, the Ninth Circuit determined that the State of California under its police power had no authority, in the face of federal laws which preempted the field of airspace management and aircraft noise control, from requiring an unwilling airport proprietor to impose a curfew on aircraft flights. Since the noise regulations in that case were not implemented by an airport proprietor, but, in fact, were challenged by an airport proprietor, the Court did "not address the scope of the [proprietor] exception . . . ." 651 F.2d at 1316. Petitioner focuses on *dicta* in that decision which it argues indicates that the "proprietary powers and rights" exception applies only to regulations designed to limit an airport proprietor's liability for activities arising from its airport operations (Pet. 11-12). 651 F.2d at 1316. Significantly, however, petitioner completely overlooks the fact that, in the same year, in a decision which directly addressed the scope of an airport proprietor's rights, the Ninth Circuit ruled that the City of Santa Monica, as proprietor of an airport, "should be allowed to define the threshold of its liability, and to enact noise ordinances under the municipal-proprietor exemption if it has a rational belief that the ordinance will reduce the possibility of liability *or enhance the quality of the city's human environment*". *Santa Monica Airport Association v. City of Santa*

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and replace it with a "nondiscriminatory policy restricting use of the airport . . . (Br. App. A at 3a).

Also inapposite is ATA's reliance on the Civil Aeronautics Board (CAB) decision in *Austin/San Antonio-Atlanta Service Investigation*, 80 C.A.B. 242(1979). In that case, the CAB refused the suggestion of local authorities, including the City of Austin, that it take into account airport congestion and limit entry into a single market to two competing airlines. The CAB's decision that it was "not now inclined to deny entry to any qualified applicant simply in order to avoid airport congestion" (80 C.A.B. at 250) must be read in light of Congress' statement one year later that airport proprietors may "deny access to a new carrier or additional operations by an existing carrier in a primary hub area . . . ." H.R. Rep. No. 96-887, *supra*, note 6.

Monica, 659 F.2d at 104 n.5 (emphasis supplied). To the same effect, the Second Circuit, in tracing the authority of an airport proprietor to enact noise ordinances, noted that "perhaps more important" than the the right of an airport proprietor to limit liability is "that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access". *British Airways Bd. v. Port Authority of New York*, 558 F.2d at 83.

c. Finally, the decision below is consistent with the only court of appeals decision to have ruled on the issue of whether a perimeter rule is a valid exercise of an airport proprietor's rights. In *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982), the Court rejected a preemption challenge to the perimeter rule promulgated by the FAA at National Airport. In enacting the rule, the FAA relied not on safety concerns, but rather, on its power as proprietor of the airport. 679 F.2d at 1193-94. "Analogizing to the right of a store owner to run his business, FAA acted to manage, as best it could, the great and increasing volume of air traffic in the Washington area" (679 F.2d at 1194). Petitioner (Pet. 14-15 n. 20) notes that the preemption challenge in that case was rejected because "section 105 by its terms did not apply to federal agencies. [679 F.2d] at 1194." However, as the district court below noted, the *City of Houston* court "also held, as an independent ground, that the FAA's proprietary interest was sufficient to justify the rule". (Pet. App. 11a). *City of Houston*, 679 F.2d at 1193 ("The Federal Aviation Act and the FAA's status as proprietor of National and Dulles provide independent support for its decision"). As the district court below observed, there is "no real distinction between the FAA's interest, as proprietor of an airport system, to manage its congestion problems by use of a perimeter rule, and the interest of the Port Authority, as proprietor of LaGuardia, Kennedy, and Newark, to do the same" (Pet. App. 11a).[5]

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[5] Petitioner also contends (Pet. 15) that the decision below conflicts with the decision rendered by the CAB in *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644 (1979). In that case a majority of the CAB held that the local authorities had no veto authority over a CAB decision to certify operations

(Footnote continued)

2. Petitioner next contends that the perimeter rule is preempted because it constitutes a direct rather than incidental regulation of "rates, routes, or services", which is prohibited by Section 105(a)(1) of the Deregulation Act. 49 U.S.C. app. 1305(a)(1). Petitioner argues that "[b]y permitting direct local regulation of the length of non-stop flights and thus of rates, routes, and services, the decision below undercuts the federal plan of deregulation" – "to provide abundant, affordable, and convenient air service" (Pet. 12). The amicus, the ATA, similarly argues that the decision below allows "airport owners to adopt rules relating to routes and services in the name of proprietary rights and powers", thereby rendering "subsection 105(a)(1), and thus all of Section 105, meaningless" (Br. at 9). Petitioner and the amicus misread the statute and misunderstand the effect of the perimeter rule on air travel.

Even if the perimeter rule does have some effect on "rates, routes, and services"[9], this does not mean that the rule is preempted. Section 105(a)(1) was enacted not to limit airport proprietor rights, but rather, to prevent states and other local governmental

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of Southwest Airlines between Dallas/Fort Worth (Love Field) and New Orleans because the local authorities wanted to bar interstate flights from Love Field. One Board member dissented, finding no reason to question the local authorities' determination that interstate flights should be limited to the Dallas/Fort Worth Regional Airport. However, of most importance, although a majority of the CAB rejected what it found to be an attempt to veto its certification, it explicitly recognized that its decision granting the application did not prevent the local authorities from exercising whatever legitimate proprietary rights they might have. In this situation, the Port Authority is not discriminating against interstate operations at LaGuardia Airport. The Port Authority is simply exercising a legitimate proprietary right it exercised, albeit informally, prior to deregulation – the power to combat congestion at its smallest major airport by requiring that airlines operating out of that airport observe a reasonable perimeter rule.

[9] The court of appeals below agreed with the district court that "the perimeter rule may be a regulation 'relating to . . . routes' " but nevertheless, falls within the proprietary powers exception (Pet. App. 27a). We argued below, and we still believe, that the perimeter rule as enacted does not affect Western's "routes" since it remains free to operate its nonstop Salt Lake City-New York Service at either Kennedy or Newark airports. The perimeter rule merely diverts long-haul traffic from LaGuardia to the other major airports operated

(Footnote continued)

entities from promulgating *economic regulations* for air carriers, a regulatory function which was previously exercised by the CAB.[10] See H.R. Conf. Rep. No. 95-1779, 95th Cong. 2d Sess. 94-95 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3804-3805; 123 Cong. Rec. 30595-30596 (1977). Section 105(b)(1) makes clear that airport proprietor's powers remain intact by providing, in no uncertain terms, that "*[n]othing in subsection (a)* of this section shall be construed to limit" an airport operator's proprietary powers (emphasis supplied). This necessarily means that even though a regulation may be found to affect "rates, routes, or services", an airport proprietor retains the authority under subsection (b) to promulgate rules and regulations in the exercise of its proprietary powers. While petitioner apparently admits that the statute contemplates that certain rules enacted by an airport proprietor may "*incidentally*" affect "rates, routes, or services" without being preempted (Pet. 12, emphasis in original), its concession misses the point. As the court of appeals below recognized (Pet. App. 27a), the inquiry is not whether the regulation in some degree, incapable of precise measurement, impinges on "rates, routes, or services", but rather, whether it "falls within the powers reserved to the airport proprietors by Congress". *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 96-97 (2d Cir. 1986), *cert denied*,

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by the Port Authority which are larger and therefore better able to accommodate the increased congestion which such traffic causes. Further, petitioner is free to operate from LaGuardia to points outside the perimeter as long as it makes one stop inside the perimeter. (Pet. App. 11a).

[10] The ATA agrees with this basic proposition stating in its amicus brief that the goal of deregulation was "to assure that state and local authorities would not move to fill the vacuum left by the cessation of *federal economic regulation* of the national air transportation system" (Br. at 6, footnote omitted, emphasis supplied; see also ATA Br. at 3,4,5,6,8 and 9). Further, as ATA notes (*Id.* at 5-6), Congress was also concerned about dual (Federal/State) regulation of interstate/intrastate service. Nonetheless, at the same time, Congress made clear that deregulation was "not intended to preempt the exercise of normal proprietary functions by airport operators . . . ." 123 Cong. Rec. 30595-30596 (1977). As this brief will demonstrate, the ATA is wrong when it assumes that the LaGuardia perimeter rule constitutes "economic regulation" of the airlines rather than a valid exercise of proprietary rights.

___ U.S. ___, 107 S.Ct. 248 (1986) ("The relevant inquiry therefore is whether the Town of East Hampton was exercising its proprietary rights as owner of the Airport . . .").

Moreover, the petitioner mischaracterizes the effect of the perimeter rule when it states that the rule works against the goals of airline deregulation which are to increase the abundance, affordability and convenience of air service. The amicus, the ATA, makes a similar mistake when it argues, without ever proving its point, that the decision below conflicts with Congressional intent underlying deregulation. As the Fifth Circuit commented, in addressing a constitutional challenge to the perimeter rule issued by the FAA for National Airport:

> No one has ever attempted completely to bar travelers from distant cities from flying to National Airport. Such an attempt might well give rise to a constitutional claim. *Rather, the perimeter rule gives travelers a choice. Those who prefer nonstop service may use Dulles; those who do not mind a stopover in Chicago, Atlanta, St. Louis, Memphis, Pittsburgh, New Orleans, or Charlotte, may take a slightly lengthier trip and arrive at or depart from National. . . ." (City of Houston v. FAA*, 679 F.2d at 1192)(emphasis supplied).

Similarly, the perimeter rule for LaGuardia, which was enacted by the proprietor of a multi-airport system in a single metropolitan area, merely "gives travelers a choice" of which airport they may wish to travel through. As the District Court below observed, "[the] effect of the perimeter rule . . . is *to divert air traffic from one airport to another within the respective systems, and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter*" (Pet. App. 11a, emphasis supplied).[11] The LaGuardia perimeter rule does

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[11] The amicus, the ATA, argues that this Court should grant certiorari because, in its view, if the decision below is allowed to stand, other major airport proprietors will enact perimeter rules and eliminate flights between

(Footnote continued)

not regulate the economics of air service between New York and other points beyond the perimeter because "*access to the New York area remains unimpeded at the other area airports*" (Pet. App. 17a, emphasis supplied). Indeed, in view of the fact that a formal perimeter rule was adopted by the Port Authority in order to alleviate the critical problems of airport congestion during peak periods of travel at LaGuardia — the major airport in the area with by far the smallest land area (Pet App. 14a-15a) — the rule operates in furtherance of, not against, the goal of improving the convenience of air service (Pet. App. 11a).[12]

3. Petitioner also asserts that by sustaining the Port Authority's adoption of a perimeter policy at LaGuardia, the court has hampered "the FAA's ability to carry out its duty to promote

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certain cities thereby affecting a substantial number of airline passengers (Br. at 13-14). As does the petitioner, the ATA misunderstands the effect of the LaGuardia perimeter rule and the limited holding of the decision below sustaining the rule. As the courts below recognized, in this case access to the New York area by air carriers desiring to provide non-stop service outside the perimeter remains unimpeded. The decision below merely sanctions reasonable, nondiscriminatory perimeter rules which are enacted by a multi-airport proprietor such as the Port Authority.

[12] Petitioner grossly overstates the effect of the decision below when it argues that its rationale would sanction other far-reaching measures designed to reduce ground congestion such as an airport proprietor's elimination of discount fares, regulation of airline schedules and restrictions on the amount of baggage (Pet. 13). As we have noted, by the enactment of Section 105(a)(1) and 105(b)(1), Congress sought to prevent states and other local governmental entities from assuming *economic regulatory* functions over airline service and fares previously exercised by the CAB, while preserving an airport proprietor's authority to exercise its proprietary rights (*supra* at 12-14). In light of this clear legislative purpose, a court could easily find that the control of airline fares, a matter which prior to deregulation was pervasively controlled by the CAB, would not constitute a legitimate exercise of an airport proprietor's rights. Similarly, depending on how such measures were drawn, the same might be said for attempts to control airline schedules or passenger baggage allowances. In any event, consistent with the decision below, a court would have to scrutinize such rules to determine whether they " 'unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.' " (Pet. App. 12a, citation omitted).

(Footnote continued)

efficient use of the nation's airspace", citing 49 U.S.C. 1348 (Pet. 16). Aside from the fact that petitioner's allegation is best addressed, at least in the first instance, to the FAA (Pet. App. 6a-7a, 16a), petitioner once more misconstrues the effect of the perimeter policy. The perimeter policy is a permissible exercise of the Port Authority's power, as proprietor of a multi-airport system, to control ground congestion and airport access at LaGuardia Airport. While the FAA undoubtedly has "exclusive control of airspace management" (*British Airways Bd v. Port Authority of New York*, 558 F.2d at 83), the airlines are not immunized from regulations by airport proprietors "as the unitary local authority who controls airport access" (*Id.*). By specifically reserving the airport proprietor's powers, Congress recognized that the FAA's control of the national airspace and the proprietor's control of local airport access and environment were not incompatible[13].

4. Finally, although the petitioner does not now question the reasonableness of the perimeter rule, it is important to note that the court below was plainly correct when it determined that the rule constitutes a reasonable means to accomplish the goal of controlling congestion at LaGuardia Airport. After reviewing the Port Authority's comprehensive study of the issue and

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Petitioner also misstates the rationale of the perimeter rule when it argues that the rule is inconsistent with testimony before Congress "that a local airport authority cannot decide that service to Denver or Salt Lake City is more important than service to San Francisco" (Pet. 14, citation and emphasis omitted). In adopting a formal perimeter rule for LaGuardia Airport, the Port Authority did not decide that service to any one destination was more important than service to another, but rather, that long haul service should be handled at its larger airports which are better equipped to deal with the congestion problems created by such flights.

[13] Petitioner argues now, as it did on appeal that the perimeter rule is preempted by the FAA's issuance of slots for takeoff and landing at LaGuardia, an airport designated as a high density airport by the FAA. 14 C.F.R. 93.123. (Pet. 16-17). Such argument is totally lacking in merit. First, petitioner fails to show any conflict between the perimeter rule and the issuance of slots by the FAA (Pet. App. 12a n.12). This is not surprising since the FAA does

(Footnote continued)

after a full hearing on the merits, the district court below, in an opinion which was affirmed as "well-reasoned" by the court of appeals, found that opening LaGuardia to long haul traffic would only worsen the ever increasing congestion problems at the airport. Significantly, although a perimeter policy has applied to LaGuardia Airport since the late 1950's, aside from this litigation, no airline or other party has challenged the policy in court. Moreover, while the petitioner and the ATA attempt to magnify the significance of the holding by the court below, the actual issue decided was merely that a proprietor that operates more than one airport in a single metropolitan area has the authority to enact a reasonable, nondiscriminatory perimeter rule for its smallest major airport in order to control congestion at that airport. Further review of this decision is plainly unwarranted.

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not require that the slots be used for any particular service. Moreover, as the court of appeals held, the perimeter rule is a proper exercise of the Port Authority's proprietary powers and "[t]he statute . . . authorizes the Authority to regulate those slots in accordance with its proprietary powers" (Pet. App. 27a).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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No. 87-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

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RULE 28.1 LISTING

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ARGUMENT

I. This Case Involves An Important Issue Of Federal Law.

In characterizing this case as simply involving a "narrow issue of statutory interpretation" regarding whether a multi-airport proprietor "has the authority to enact a reasonable, nondiscriminatory perimeter rule" (Opp. Br. 7, 17), the Port Authority seeks to obfuscate the importance of the questions presented. In sharp contrast, the chief legal officer of the FAA has stated that the matter of airport access is "the most important issue facing aviation in this country and will remain so for at least the next twenty years."[1]

This "most important" issue is now before this Court in this case. In discussing the decision below, the FAA's Chief Counsel has said:

> We are not willing to concede that the current law can be reconciled with a holding that a perimeter rule, which is essentially an airspace regulation, even in the context of a multi-airport system, is not preempted by the federal government. *We cannot condone or accept restrictions which, even if reasonable and non-discriminatory, go beyond proprietors' lawful rights and enter the clearly federal domain of regulation of the airspace or*

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[1] Ellett, *Airport Access Issues*, The Air & Space Lawyer, Summer 1987, at 1, reprinted in the appendix. The brief in opposition does not even acknowledge these views of the FAA, although they were discussed in the previous *amicus curiae* brief filed by the Air Transport Association of America.

> *regulation of a carriers' routes, rates, or services.*

Ellett, *supra* n.1, at 19 (App. 8a) (emphasis added).

Without doubt, the perimeter rule directly interferes with this federal domain. It bars Delta from flying non-stop between Salt Lake City and LaGuardia[2] and it denies passengers non-stop service.[3] It is a locally imposed restriction that extraterritorially governs airline operations nationwide.

The Port Authority argues that its authority to impose a perimeter rule is supported by various cases allowing airport proprietors to impose takeoff noise limits and to establish other rules designed to combat noise and congestion. This misses the point. No one disputes that controlling airport congestion is a legitimate goal for an airport proprietor that may be

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[2] The LaGuardia Airport perimeter rule has a dramatic effect on airline competition for long-distance traffic into and out of the New York area. As recognized in regulatory decisions, a substantial portion of air travelers show a significant preference for LaGuardia Airport. *Texas Air-Eastern Acquisition Case*, Order 86-7-21, at 13-14 (Dep't of Transp. July 9, 1986), *aff'd*, Order 86-8-77 (Dep't of Transp. Aug. 26, 1986). Thus, to serve effectively all of the New York area, service at Kennedy, Newark, and LaGuardia is required.

[3] Remarkably, the Port Authority argues that its perimeter rule "merely 'gives travelers a choice' of which airport they may wish to travel through." (Opp. Br. 14). A *restriction* on flight availability can hardly be regarded as "giving travelers a choice." Absent such a restriction—that is, given a choice—there can be no doubt what travelers would choose. Else why impose the rule?

achieved by a broad range of measures.[4] What section 105 proscribes—and the decision below unprecedentedly condones—is a proprietor's using that goal to justify dictating what routes airlines may fly, what rates they may charge, or what services they may provide.[5]

The Port Authority concedes that section 105 was designed to prevent local governments from replacing the former CAB's economic regulations of air carriers with their own (Opp. Br. at 12-13 & n.10). Yet this is precisely what the Port Authority seeks to do. In dictating what non-stop routes airlines may fly, the perimeter rule duplicates the type of regulation formerly imposed by the CAB. As a route limitation, it is thus no different than the rate and service limitations that the Port Authority concedes are preempted (Opp. Br. 15 n.12).

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[4] Contrary to the brief in opposition, Delta does not agree that the LaGuardia Airport perimeter rule is reasonable. The question presented, however, is whether a local government may enact a perimeter rule with extraterritorial effect, not the "reasonableness" of the specific rule imposed at LaGuardia Airport.

[5] Similarly unavailing is the Port Authority's reference to a 1980 House Committee report on an appropriations bill, never enacted, which suggested that an airport proprietor could deny an airline access to one airport if it affords access to another airport at the same hub (Opp. Br. 8 n.6). The conditions under which airlines may be denied access to an airport altogether are governed by 49 U.S.C. app. § 2210, which allows denials of access provided that airlines are treated in a nondiscriminatory and reasonable manner. Section 2210, of course, does not purport to override section 105's prohibitions by allowing a proprietor to condition access to an airport on the basis of an airline's rates, routes, or services.

Section 105 expressly provides that its prohibition on renewed regulation of rates, routes, and services "shall not be construed to limit" exercises of local governmental "proprietary powers" (which may incidentally affect airline service). Nothing in section 105, however, allows local governments to expand their proprietary powers to encompass the rate and route regulation previously exercised by the CAB.[6] By upholding the extraterritorial perimeter rule on the basis of serving some legitimate local goal, the decision below for the first time allows local governments to impose a wide range of rate, route, and service regulations on an industry that Congress sought to deregulate.

II. The Decision Below Is In Conflict With Prior Decisions.

The Port Authority's attempt to dispel the conflict between the decision below and prior decisions is also without merit. The brief in opposition does not explain how the decision below can be reconciled with the Ninth Circuit's holding in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The court there held that the "proprietary powers" exception is con-

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[6] Thus, the Department of Transportation's regulation concerning federal preemption permits local governments to exercise their proprietary powers only "when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective *in a manner that does not conflict with the provisions and policies of the* [*Airline Deregulation*] *Act*." 14 C.F.R. § 399.110(f) (1987) (emphasis added).

gruent with an airport operator's exposure to liability:

> The rationale for [the proprietor] exception is clear. Since airport proprietors bear monetary liability for excessive aircraft noise under *Griggs v. Allegheny County*, 369 U.S. 84 (1962), fairness dictates that they must also have power to insulate themselves from that liability. But before an entity may possess this power, it must bear the responsibility, either actual or potential, for excessive aircraft noise.

651 F.2d at 1316-17 (footnotes omitted). The Port Authority makes no argument that it could be liable for allowing long-distance non-stop flights into La-Guardia. Instead, it seeks to dismiss the above language as *dictum* and argues that the Ninth Circuit's earlier decision in *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), envisions a broader application of the proprietary powers exception than the scope of *Griggs* liability. In fact, while the *Santa Monica* decision is less definite than that in *San Diego*[7] the thrust of the *Santa Monica* opinion is that the possibility of municipal liability requires that a proprietary power exception be adopted. 659 F.2d at 103, 104 n.5.

The Port Authority is also incorrect in its contention that the decision below is supported by the Fifth Circuit's opinion in *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). In rejecting a section 105 challenge to the FAA's perimeter rule for National Air-

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[7] Thus, *Santa Monica* stated: "The [proprietary powers] caveat *may have been* thought necessary in view of the Court's earlier decision in *Griggs* . . . ." 659 F.2d at 103 (emphasis added).

port in that case, the Fifth Circuit took pains to distinguish the FAA from local government proprietors: "Nothing could be more certain than that the restrictions of § 1305 do not bind the FAA, an arm of the federal government which just happens to own two airports." *Id.* at 1194. Similarly, the argument of the Port Authority (Opp. Br. 11) that the FAA's proprietary interest is the same as the Port Authority's is incorrect and misleading. In *City of Houston*, after noting that "the FAA is not the typical airport proprietor," *id.*, the court actually held that cases reciting the "extremely limited" regulatory role of local airport proprietors did not limit the FAA:

> Petitioners again miss the key question, that is, whether the FAA is governed by the same rules as a local proprietor. The answer, obviously, is no.

679 F.2d at 1194.

Thus, *City of Houston* did not uphold the National Airport perimeter rule based on the proprietary powers of *local governments*. Indeed, the only prior federal court decision regarding a locally imposed perimeter rule of which petitioner is aware is *Pacific Southwest Airlines v. County of Orange*, No. CV 81-3248 (C.D. Cal. Nov. 30, 1981) (discussed in *City of Houston*, 679 F.2d at 1194), in which the district court, acting pursuant to section 105, enjoined a 500 mile perimeter rule at John Wayne Airport in Orange County, California.

CONCLUSION

The issue presented by this case vitally affects the airline industry, airports throughout the nation, and potentially millions of air travelers. The decision be-

low resolves that issue in a manner that negates the mandate of Congress to deregulate and conflicts with the decisions of other circuits. As indicated by the comments of the FAA's counsel, this case presents a unique opportunity for the Court to resolve the issue. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

AIRPORT ACCESS ISSUES

[From *The Air & Space Lawyer*, Summer 1987, at 1.]

By E. Tazewell Ellett*

Editor's Note: *These are the remarks given by E. Tazewell Ellett on Thursday, October 16, 1986, at the ABA Forum Committee on Air and Space Law Fourth Annual Forum. Obviously some events and stated facts may be different now.*

The topic "Airport Access Issues" is in my view the most important issue facing aviation in this country and will remain so for at least the next twenty years. All of you are or will be affected in one way or another by airport access and airport noise issues, either as counsel representing one side or another in an airport access dispute or simply as a private citizen forced to put up with aircraft noise or with the inconvenience of traveling in an extremely burdened national air transportation system. Now I will briefly outline the federal government's role in these issues and give you some insight into recent and particularly thorny situations involving airport access that have been consuming a great deal of my time and the time of many on my legal staff.

The starting point for federal involvement in airport access and noise issues is, of course, statutory. The FAA, as part of the Department of Transportation, has a dual statutory mandate. We are charged with both fostering a vital national system of airports and airways, and controlling, to the extent practicable, the negative effects of aircraft noise on the public. This dual responsibility of the FAA is extremely important because it places on the FAA a legal obligation on both sides of airport access and air-

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port noise disputes. Both these mandates, of course, must be viewed within the context of our plenary authority and primary duty to safely and efficiently control the use of the nation's airspace. All of our efforts toward developing the national air transportation system or protecting the environment must complement our duty to control the airspace.

The mandate that the FAA create and maintain a vital and efficient air commerce system is not new. This focus has been present since the beginning of the federal government's involvement in civil aviation. The promotion and fostering of aviation and of a system of national airports and airways was the major emphasis of the Air Commerce Act of 1926[1] and the Federal Airport Act of 1946.[2] The Federal Aviation Act of 1958,[3] while primarily addressing the need for a stronger safety emphasis, continues to focus on development of the system and requires the administrator to "encourage and foster the development of civil aeronautics and air commerce in the United States and abroad."

The strongest statement of this mandate is more recent. The Federal Aviation Act was amended in 1978 by the Airline Deregulation Act of 1978.[4] Now, by virtue of these amendments, the FAA must consider the following goals as being in the public interest:

- the availability of a variety of adequate, economic, efficient, and low-price services by air carriers;
- the placement of maximum reliance on competitive market forces;

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[1] 44 Stat. 568 (1926).

[2] 49 U.S.C. § 1101, *et seq.*

[3] 49 U.S.C. § 1301, *et seq.*

[4] 49 U.S.C. §§ 1301, 1302, 1305 to 1308. 1371-1374, 1376, 1378, 1379, 1382, 1384, 1386, 1389, 1461, 1471, 1482, 1490, 1504, 1551, 1711, 1729, 1743.

- the development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States;
- the encouragement of air service at major urban areas in the United States through secondary or satellite airports;
- the maintenance of a comprehensive and convenient system of continuous scheduled interstate and overseas airline service for small communities;
- the encouragement of entry into markets by new air carriers; and
- the regulation of air commerce in such a manner as to best promote its development.

Likewise, the Airport and Airway Improvement Act of 1982[5] requires that this agency continue airport and airway improvement programs and develop more effective management and utilization of the nation's existing airports in order to meet the increasing demands resulting from the projected growth of aviation.

The other aspect of our dual statutory charge is found in section 611[6] of the Federal Aviation Act, the Aviation Safety and Noise Abatement Act of 1979 (ASNA),[7] and the National Environmental Policy Act (NEPA).[8] Pursuant to each of these authorities, the FAA acts to protect the public health and welfare from the impacts of aircraft noise.

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[5] 49 U.S.C. 2201, *et seq.*

[6] 49 U.S.C. 1431.

[7] 49 U.S.C. 2101, *et seq.*

[8] 42 U.S.C. 4321, *et seq.*

Under ASNA, we are authorized to fund airport noise compatibility studies and to approve our [sic] disapprove any noise compatibility programs developed by airport proprietors as a result of those studies. To implement this responsibility, we promulgated part 150 of the Federal Aviation Regulations.[9] Pursuant to ASNA and part 150, we approve noise compatibility programs submitted by airport proprietors so long as the measures proposed are reasonable, nondiscriminatory, do not unduly burden interstate or foreign commerce and are reasonably consistent with the goal of reducing existing noncompatible uses and preventing the introduction of additional noncompatible uses.

These two FAA responsibilities do, of course, conflict with one another, but, in fact, it is entirely appropriate that only one entity have that dual responsibility and that the federal government be that one entity.

Consider these FAA responsibilities in light of the following predictions. Industry and government projections show that there will be a forty percent increase in air carrier hours flown per year between now and the year 2000. In general aviation, there are predictions of a fifty percent increase in hours flown annually. Predictions are that air carrier enplanements will increase by eighty percent and commuter enplanements by 178 percent between now and the year 2000. The air carrier and commuter fleets are predicted to grow by fifty-seven and seventy-one percent, respectively.

We now have in this country 3,219 airports which handle our current commercial and general aviation activity. To keep up with the demand we forecast, 3,750 airports would be needed by the year 2000. That is an increase of 531 airports in only thirteen years. Because an increase of that magnitude in the number of airports by the year 2000 is

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[9] 14 C.F.R. 150.

highly unlikely, this country simply will need to have increased capacity at existing airports if we are going to avoid a complete gridlock in the national air transportation system.

Our duty to foster aviation compels us to seek ways to accommodate this increasing demand for airport capacity. Simultaneously as we look for additional funds and technical improvements to increase airport capacity, we are being met with a rapidly swelling tide of restrictions on airport access imposed by airport proprietors because of pressures caused by aircraft noise. These noise-based restrictions on airport access are reducing capacity at airports from one end of the country to the other. Here our other statutory duty comes into play, the duty to mitigate the negative environmental impacts of aircraft noise. The FAA works very hard to address aircraft noise problems. Over the last five years we have provided over $332.4 million in grants for noise mitigation or land use compatibility purposes. We also work very closely with airports and their users to determine reasonable solutions to aircraft noise problems. In that regard, we seek solutions which are fair to all involved, not just those with the most local political clout.

We are extremely concerned about the quickly growing number of airports which have in place or have in the planning stages restrictions on access which prevent those airports from being operated to full capacity. The pressure on airport proprietors to restrict traffic growth for reasons of noise is increasing, and comes from a number of directions: from the airport proprietor's need to limit it exposure to noise related damages in litigation; from community groups desiring to reduce aircraft noise in the community or to retain the residential character of the community by preventing the business and industrial growth which can compatibly accompany airport commercialization; or even from "city hall," in cases where the

airport proprietor is an arm of "city hall" and is forced to implement restrictions, albeit reluctantly.

The FAA has no agenda to deter local governments and communities from accomplishing legitimate local goals. But we do have the responsibility to ensure that the national system of airports and airways is not burdened by unjustified local restrictions. When faced with a proposed noise-based restriction on aircraft operations, we like to see the following things: (1) we want documentation of the nature and extent of the problem airport proprietors are seeking to address through the proposed restriction; (2) we want to see that the restriction has been developed or selected in a reasonable manner, with adequate opportunity for outside input, including that of the FAA; (3) we want to know that the constraints being proposed are of such a benefit to the problem presented that any burdens on commerce resulting from their imposition are reasonable; and finally, (4) we want to be shown that there are no less restrictive options available which could resolve the problem.

We do not oppose restrictions which reasonably and without discrimination accomplish real environmental benefits without encroaching on a federally preempted area or unduly burdening the national system. We understand the need of the airport proprietor to balance sometimes competing interests in the same manner the federal government must often do so. Under current and longstanding legal authority, the airport proprietor has the legal exposure in noise-related damage actions. It has been clear since the 1962 U.S. Supreme Court decision in *Griggs v. Allegheny County*,[10] that, because the airport proprietor selects the location of the airport and has the responsibility to purchase adequate land around the airport to ensure that aircraft noise does not become a nuisance, the airport

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[10] 369 U.S. 84 (1962).

proprietor thus is responsible when aircraft noise does become a nuisance.

This exposure naturally brought with it some authority to minimize the liability. The U.S. Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*,[11] pointed out in the now famous footnote 14 that a state or local government, as proprietor of an airport, does have some authority to set noise limits at its own airport. The real holding of the case, however, was that Congress, through the Federal Aviation Act and the Noise Control Act of 1972, had preempted non-airport proprietor control over aircraft noise. Nothing in this case even hints at an extension of airport proprietors' rights into an area outside that of controlling aircraft noise.

The extent of these airport proprietors' rights has to this day not been clearly defined. In the 1976 case of *National Aviation v. City of Hayward*,[12] the United States District Court for the Northern District of California upheld a municipal ordinance denying the use of that city's air terminal to aircraft which exceeded a specified noise level. The court in *Hayward* utilized a balancing test and found that so long as the statute regulated ". . . evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental . . .," it was a legitimate exercise of the city's proprietary authority.

In the cases of *British Airways Board v. Port Authority of New York and New Jersey*, better known as Concorde I[13] and Concorde II,[14] the Second Circuit in 1977 outlined some fairly clear boundaries on proprietors' rights. The court held that an airport proprietor is ". . . vested only

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[11] 411 U.S. 624 (1973).

[12] 418 F.Supp. 417 (N.D. Cal. 1976).

[13] 558 F.2d 75 (2d Cir. 1977).

[14] 564 F.2d 1002 (2d Cir. 1977).

with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs. Any other conduct by an airport proprietor would frustrate the statutory scheme and unconstitutionally burden the commerce Congress sought to foster."[15]

In a much more recent case, *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*,[16] the United States District Court for the Southern District of New York found that a perimeter rule at LaGuardia Airport which prohibits airlines from operating flights beyond 1,500 miles was a reasonable airport proprietor action. The court dismissed Western's claim that proprietors' rights extend only to the regulation of noise and found that the management of congestion problems, through imposition of a perimeter rule, is a valid exercise of proprietors' rights when done by the proprietor of a multi-airport system.

We in the FAA are concerned about this decision. We are not willing to concede that the current law can be reconciled with a holding that a perimeter rule, which is essentially an airspace regulation, even in the context of a multi-airport system, is not preempted by the federal government. We cannot condone or accept restrictions which, even if reasonable and non-discriminatory, go beyond proprietors' lawful rights and enter the clearly federal domain of regulation of the airspace or regulation of a carriers' routes, rates, or services.

This perimeter rule decision, like an earlier case which upheld a takeoff fee imposed on small aircraft during peak periods of commercial traffic, simply underscores the fact that the scope of proprietors' rights is not yet clearly defined or limited. A gradual broadening of these rights

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[15] 558 F.2d at 84.

[16] No. 86 Civ. 6259, slip op. (September 3, 1986).

might well severely burden the national air transportation system.

We are becoming increasingly concerned about burgeoning noise-based restrictions on aircraft operations, and therefore are increasingly seeking from airport proprietors information supporting the restrictions so that we can balance their benefits against their burdens. We are concerned that certain airport proprietors are not adequately considering the burden of their proposed restrictions on the national air transportation system. This is not surprising since airport proprietors do not have the responsibility to protect the national system (only the FAA has that) and since proprietors generally do not have access to information on the impacts of local restrictions on the national system.

Another reason why we are becoming, of necessity, increasingly active in opposing what we believe to be illegal, unjustified, or unreasonable restrictions on aircraft operations is that developing case law has limited the ability of private parties, including the air carriers and other airport users, to bring a cause of action claiming that airport proprietor-imposed restrictions are illegal.

In the case of *Montauk-Caribbean Airways, Inc., dba Long Island Airways v. Judith Hope, et al.*,[17] the Second Circuit Court of Appeals, earlier this year, held that the airline complainant, which desired more generous lease terms, had no right to bring an action to enforce the federal preemption and exclusive rights provisions of the Federal Aviation Act or the unjust discrimination and exclusive rights prohibition provisions of the Airport and Airway Improvement Act. The airline's claims that an exclusive right had been granted a competitor, that it was being discriminated against, and that the airport owner was illegally regulating routes, rates, and services of a

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[17] 784 F.2d 91 (2d Cir. 1986).

carrier were held to be claims that could only be raised by the federal government.

In another case on this subject, *New York Airlines, Inc. v. Dukes County, Martha's Vineyard Airport Commission, et al.*,[18] the United States District Court for the District of Massachusetts held that the carrier had no private right of action under the Federal Aviation Act, but that the carrier did have a right to claim a violation of the Constitution's Supremacy Clause and to claim discrimination and the granting of an illegal exclusive right under the Airport and Airway Improvement Act. Despite this case, which has not been followed elsewhere, it appears that the options for carriers or other airport users are becoming limited, and that the federal government must act if the viability of the system is to be protected when unjustified and unjustifiable constraints are imposed.

Given our statutory responsibilities and the increasing activity of airports in this area, it is not surprising that the FAA now is actively involved in several access restriction disputes around the country. Here are a few:

- In Long Beach, California, we have supported the carriers' action in court to effect an immediate increase in commercial operations at Long Beach Airport because of data indicating additional flights can be accommodated without an adverse environmental effect.
- In San Francisco, we have issued a notice of proposed cease and desist order to the city because of its refusal to allow hush-kitted Boeing 707 aircraft to operate at San Francisco Airport. We have taken this step because we believe the city's refusal to admit those aircraft is unjustly discriminatory and violates federal law and the city's own ordinance on the subject, which allows stage 2 aircraft like

[18] No. 85-2342-W, slip op. (December 4, 1985).

the B-707 to operate at the airport. An administrative proceeding now is underway on this issue.

- In Denver, we are trying to obtain information from the city to determine if there is justification for restrictions the city wants to place on operations on proposed new runways and at the proposed new airport. The city has signed an agreement with a neighboring county which, if implemented, will likely place the city in the status of violating federal law and the promises made by the city in its airport grant contract with the FAA.
- In Minneapolis, we are seeking to have a recently imposed ban on all training operations repealed or modified as an unlawful intrusion into the federally preempted area of regulation of airspace.

Despite these present and possible future confrontations, it would be a mistake to assume that the FAA and the nation's airports are always in a confrontational posture. This is certainly the exception rather than the rule.

In many communities across the country, we fund and participate in the part 150 study process, which helps local officials and citizens resolve airport noise problems effectively without infringing on the vitality of the national air transportation system.

Our role is to ensure that airport operators and local communities find the correct mixture of environmental controls and open access to their airports. Whether we play this role in the context of a part 150 study, in litigation, or in some less formal involvement, we will be there, looking for the best solution to both the noise problem and the problem of increasing demand amidst extremely scarce capacity.

In closing, I would like to note that the FAA and the Department of Transportation currently are considering whether there is better way to manage both of these FAA

roles. As you probably know, in January of this year, we published a notice of proposed policy covering airport access and capacity issues. We held a series of public hearings on those issues across the country, and we now are in the process of finalizing the course we want to take on these issues in the future. Although it is not yet certain in which direction we will move, we will be attempting to ensure that the legal framework in which we operate provides fairness to airports and airport users alike and that decisions in this area consistently reflect the appropriate balance between the interests of the national air transportation system and local community interests. Whether this will mean new legislation, additional regulations, additional policy statements, or other action, we do not know as of yet, but regardless of the means, the goal will be to create a system for addressing these issues which is clearer, more predictable, and more useful to all concerned.

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No. 87-333

In the Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC., PETITIONER

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Port Authority of New York and New Jersey, which operates three major airports in the New York City area, may limit the distance of flights into and out of one of those airports under the "proprietary powers" reserved to it by 49 U.S.C. App. 1305(b)(1).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The Port Authority of New York and New Jersey, which functions pursuant to an interstate compact between the two states, operates the three major commercial airports serving the New York City area, Kennedy International Airport, Newark International Airport, and LaGuardia Airport. The Port Authority is required to operate these airports as a unified system. N.J. Stat. Ann. § 32:1-35.1 (West 1963); N.Y. Unconsol. Law § 6631 (McKinney 1979). Since the 1950's, the Port Authority has had a "perimeter rule" in effect at LaGuardia, the smallest of the three airports. Until 1984, the perimeter rule was informal and prohibited non-stop flights into or out of

LaGuardia to or from points more than 2,000 miles from the airport. In 1984, following a study, the Port Authority instituted a formal 1,500-mile perimeter rule but "grandfathered" service to Denver, which is more than 1,600 miles from LaGuardia. Pet. App. 2a, 14a. The Port Authority "believes that business travelers create considerably less airport congestion than vacationers" and instituted the perimeter rule "to encourage the use of LaGuardia by business people, who often make relatively short trips, and the use of Newark and Kennedy for vacation flights" (*id.* at 20a).

In March 1986, petitioner[1] obtained several "slots" at LaGuardia through a lottery conducted pursuant to regulations promulgated by the Federal Aviation Administration (FAA).[2] Petitioner, which has operated between Kennedy and its hub at Salt Lake City International Airport for a number of years, sought permission from the Port Authority to operate non-stop commercial flights between LaGuardia and Salt Lake City. Since Salt Lake City is nearly 2,000 miles from LaGuardia, the Port Authority denied permission, relying on its perimeter rule. Pet. App. 1a-3a.

Petitioner then instituted this action, alleging that the Port Authority's perimeter rule is contrary to 49 U.S.C. App. 1305(a)(1), which provides that no state or interstate agency may enforce any rule "relating to rates, routes, or services of any air carrier." The district court concluded

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[1] This case was initially brought by Western Air Lines, Inc. In 1987, Western merged into Delta Air Lines, Inc.

[2] The FAA restricts the number of flights into and out of four "High Density Traffic Airports," including LaGuardia, through the use of slots. Each slot authorizes the airline to perform one take-off or landing at the airport during a designated half-hour period. See 14 C.F.R. 93.211-93.227.

that the rule "may be fairly characterized as a regulation touching this area" (Pet. App. 7a). However, the court concluded that the Port Authority's perimeter rule is a valid exercise of its proprietary powers under 49 U.S.C. App. 1305(b)(1), which provides that nothing in Section 1305(a)(1) shall be construed to limit the right of any state or interstate agency that owns and operates an airport "to exercise its proprietary powers and rights." With respect to the meaning of Section 1305(b)(1), the district court first noted that in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), this Court struck down a municipal ordinance that imposed a curfew on jet traffic at a privately-owned airport. The Court held that the ordinance, which was designed to limit aircraft noise, was preempted by federal aircraft noise regulations, but noted that it was not deciding "what limits, if any, apply to a municipality as a proprietor" of an airport (*id.* at 635-636 n.14). The district court then rejected petitioner's argument that Congress intended Section 1305(b)(1) to allow airport proprietors to regulate airport noise only, explaining that "Section 1305(b)(1) does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind" (Pet. App. 9a). The district court concluded that a "proprietor's interest in regulating ground congestion at its airports would appear to be at the core of proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest" (*id.* at 10a).

The court also noted that in *City of Houston* v. *FAA*, 679 F.2d 1184 (5th Cir. 1982), the court upheld the perimeter rule at Washington National Airport. While

Section 1305 did not apply in that case because the FAA (not a state or local agency) operated National at that time, the court in *City of Houston* recognized that the FAA justified its perimeter rule as an exercise of its proprietary right, as the owner of National and Dulles International Airport, to manage congestion problems at National (679 F.2d at 1193-1194). The district court here stated that "as in *City of Houston,* there is in issue a multi-airport system. The effect of the perimeter rule in each case is to divert air traffic from one airport to another within the respective systems, not to close down metropolitan area runways to all air traffic to or from points outside the perimeter." Pet. App. 11a. The district court held that the perimeter rule, "as imposed by the Port Authority to manage congestion in a multi-airport system, * * * fits comfortably within the limited role[] which Congress has reserved to the local proprietor" in Section 1305(b)(1) (Pet. App. 12a).[3]

The court of appeals affirmed "on the basis of" the district court's opinion (Pet. App. 27a). It specifically stated that it agreed with the district court's conclusion that a perimeter rule, "at least when enacted by a multi-airport proprietor such as the Authority, falls within the

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[3] The district court also rejected the claim that the Port Authority's perimeter rule unreasonably discriminates against petitioner (Pet. App. 12a-17a). While the reasonableness of the rule to achieve its stated justification may be questionable since non-stop flights are permitted from LaGuardia to Bermuda, Nassau, and West Palm Beach even though the stated justification for the rule is that the Port Authority wants business travelers (and not vacation travelers) to use LaGuardia, petitioner has not raised that claim in its petition for a writ of certiorari (see Reply Br. 3 n.4). Accordingly, this case presents no occasion for this Court to consider the reasonableness of the Port Authority's perimeter rule, a fact-bound issue that would not warrant this Court's attention in any event.

proprietary powers of airport operators exempted from preemption by section 1305(b)(1)" (*ibid.*).

ARGUMENT

Both lower courts correctly concluded that the Port Authority, as the proprietor of three major airports serving one metropolitan area, is not preempted from imposing a perimeter rule at one of its airports. Since the decision below creates no conflict in the courts of appeals and there are very few multiple-airport proprietors, further review by this Court is not warranted.

1. It has long been the case, in the regulation of commercial aviation, that "[f]ederal control is intensive and exclusive" (*Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)), so that most local regulation is preempted by the pervasive federal presence. That was not changed by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. While Congress worked a fundamental change in federal regulation of the airline industry by abolishing the Civil Aeronautics Board and placing "maximum reliance on competitive market forces" (49 U.S.C. App. 1302(a)(4)), it enacted Section 1305(a)(1) as part of the Airline Deregulation Act of 1978 to prevent local regulation from filling the regulatory vacuum it created. See S. Rep. 95-631, 95th Cong., 2d Sess. 98-100 (1978); H.R. Rep. 95-1211, 95th Cong., 2d Sess. 15-16 (1978).

Petitioner contends (Pet. 12), as the district court concluded (Pet. App. 7a), that the Port Authority's perimeter rule relates directly to petitioner's "routes" since it bars aircraft leaving LaGuardia from flying directly to any point (except Denver) more than 1,500 miles from LaGuardia. The Port Authority suggests (Br. in Opp. 12-13 n.9) that "route[]" is properly defined from a city-to-city perspec-

tive rather than an airport-to-airport perspective. Under its construction of Section 1305(a)(1), the perimeter rule is not preempted because it does not affect service between Salt Lake City and New York City, but, rather, affects service between the Salt Lake City International Airport and LaGuardia Airport. Neither construction of the word "routes" is unreasonable, and the legislative history provides no guidance in determining precisely what Congress meant. Accordingly, it is not clear, under Section 1305(a)(1) alone, whether imposition of a perimeter rule by a multiple-airport proprietor is preempted.

Whether or not the Port Authority's perimeter rule relates to "routes" within the meaning of Section 1305(a)(1), it is properly viewed, in the context of a multiple-airport system, as an exercise of a proprietory power protected from preemption by Section 1305(b)(1). As the district court concluded (Pet. App. 10a), regulation of airport congestion "would appear to be at the core of the proprietor's function as airport manager." Accord *Midway Airlines* v. *County of Westchester,* 584 F. Supp. 436 (S.D.N.Y. 1984). Reasonable steps taken to relieve congestion are therefore within the scope of the powers preserved by Section 1305(b)(1). In a multiple-airport context, imposing restrictions that reduce congestion at a busy airport in order to encourage use of a less crowded airport may be a reasonable way to relieve congestion. When the FAA operated National and Dulles airports, it imposed a 1,000-mile perimeter rule at National to minimize congestion there and to stimulate growth at Dulles, and justified its rule as an exercise of its proprietary powers. The FAA stated that it had "long recognized that an airport proprietor with control of two or more airports serving the same area can take reasonable actions to determine the nature of service provided at one airport so long as the

proprietor's other airports remains available to accommodate fully the other types of operations." 46 Fed. Reg. 36076 (1981).[4]

2. Petitioner primarily argues that the courts below erred because Congress, in enacting Section 1305(b)(1), intended that the proprietary powers protected from preemption would be strictly limited to regulations relating to noise or other potential sources of direct financial liability for the airport operator. Because "[t]he Port Authority makes no argument that it could be liable for allowing long-distance non-stop flights into LaGuardia" (Reply Br. 5), petitioner contends that the perimeter rule is beyond the Authority's proprietary powers.[5] Congress

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[4] While petitioner notes (Reply Br. 1-2, 8a) that some FAA officials have questioned whether perimeter rules ought to be authorized, even in cases involving multiple-airport proprietors, the decision below does not conflict with any official action ever taken by the FAA. Nor is petitioner correct in contending (Pet. 15-16) that the CAB, in *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644 (1979), construed Section 1305 inconsistently with the decision here. In that case, the CAB, during the period in which it was being phased out and deregulation was being phased in, concluded that specific statutory provisions governing the interim period required it to issue a certificate authorizing Southwest Airlines to fly between Love Field in Dallas and New Orleans. In its brief discussion of Section 1305(b)(1), the CAB concluded that that general provision did not give an airport operator "veto power" over a certificate issued by the CAB pursuant to the mandatory terms of the statute (83 C.A.B. at 651-652).

[5] Petitioner also argues (Pet. i Question 3; Pet. 17) that, in addition to being preempted by Section 1305(a)(1), the Port Authority's perimeter rule is invalid on account of the FAA's slot system (see note 2, *supra*). There is no merit to that contention, which petitioner does not press. The slot system, which is designed to promote more efficient use of navigable air space by limiting the number of flights arriving and departing at certain airports during certain hours (see 50 Fed. Reg. 52181 (1985)), does not relate to the distance of flights to or from the airports and therefore does not conflict with the perimeter rule.

did not draft Section 1305(b)(1) in a way that suggests that it intended it to be limited as petitioner proposes. If it had intended merely to allow airport owners to take steps to avoid liability, particularly liability resulting from aircraft noise, then, rather than broadly preserving "proprietary powers and rights" from preemption, Congress presumably would have drafted the provision more narrowly than it did. Moreover, it seems clear that Congress did not intend such a narrow construction. For example, parking restrictions might affect the routes airlines fly since an airline might decide not to fly to popular vacation spots from a particular airport that lacked inexpensive long-term parking. But Congress plainly did not intend to preempt proprietors from regulating airport parking, even though no liability attaches to proprietors on account of parking regulations.[6]

Nothing in the legislative history of the Airline Deregulation Act suggests that Congress, in preserving proprietary rights and powers, had in mind the narrow meaning petitioner suggests. Indeed, the legislative history, like the words of the statute, supports a contrary conclusion. The provision preserving proprietary powers

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[6] The adoption of noise restrictions by airport proprietors raises additional legal questions. Unlike other exercises of proprietary powers, local noise regulation must not only survive preemption under Section 1305(a)(1), but also must avoid running afoul of the comprehensive federal scheme of aircraft noise regulation found in the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234, and the Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50. An airport operator's ability to regulate noise has been understood to be grounded upon the need to mitigate its potential financial liability under *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *British Airways Board* v. *Port Authority*, 558 F.2d 75, 83 (2d Cir. 1977); cf. *City of Burbank*, 411 U.S. at 633, 635-636 n.14.

was in the House bill but not in the Senate bill.[7] Following action by the Conference Committee, which included the proprietary powers provision in the bill it produced (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 4 (1978)), members of each house engaged in a colloquy in which the questioner asked whether the bill would affect the "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level." 124 Cong. Rec. 37419 (1978) (statement of Sen. Kennedy); *id.* at 38526 (statement of Rep. Markey). Senator Cannon responded that "[i]t was not the intent of the Senate conferees to limit in any way the normal exercise of the existing proprietors' powers to place nondiscriminatory restrictions on the operations at an airport" (*id.* at 37419-37420). Similarly, Representative Anderson stated that "[i]t was not the intent of the House conferees to limit in any way the normal exercise of a proprietor's powers to determine the level and nature of service to be provided at airports" (*id.* at 38526). These statements, while not focused on the precise question presented here, are contrary to the narrow construction of Section 1305(b)(1) proposed by petitioner. Neither spokesman for the conferees suggested that the provision authorized noise regulation only or otherwise indicated an understanding

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[7] While the Senate bill did not include an express provision preserving proprietary powers in its preemption provision (S. Rep. 95-631, *supra*, at 39-40), the Senate Report stated that the prohibition against "regulations that affect routes, rates, fares, or charges should not be construed to affect or limit existing proprietary rights of airport operators to manage, operate, or regulate airports" (*id.* at 99). The House bill contained an express proprietary powers provision (H.R. Rep. 95-1211, *supra*, at 40), although the House Report did not comment on it (*id.* at 15-16).

that it had the limited effect of permitting only regulations that are designed to avoid liability.[8]

3. In any event, review is not warranted because the decision below, which is expressly limited to cases involving "a multi-airport proprietor such as the Authority" (Pet. App. 27a), involves a question of extremely limited applicability. In addition to New York City, only Los Angeles (Los Angeles International Airport and Ontario Airport), Houston (Houston Intercontinental and Hobby Airport), Chicago (Midway Airport and O'Hare International Airport), and Washington (National and Dulles) are served by multiple-airport proprietors. Washington is not affected by the question presented here because Congress, in transferring authority over National and Dulles from the FAA to a local agency, imposed a 1,250-mile perimeter rule on National. Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, § 6012, 100 Stat. 3341-388.[9]

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[8] Contrary to petitioner's contention (Pet. 11-12), the decision here does not conflict with the statement in *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982), that before an entity may regulate air[port] noise "it must bear the responsibility, either actual or potential, for excessive aircraft noise." That statement is addressed to the legally distinct context of aircraft noise regulation, which, as we have noted (note 6, *supra*), is pervasively regulated by the federal government. Moreover, that case did not involve a multiple-airport proprietor and the court did not even cite Section 1305(b)(1).

[9] Petitioner errs in suggesting (Pet. 14-15 n.20) that Congress's imposition of a perimeter rule at National Airport indicates its understanding that the proprietor could not adopt such a rule. In the absence of congressional action, the proprietor might or might not have imposed a perimeter rule, or might have imposed a different rule. Congress's action shows that it wanted to be sure that a 1,250-mile perimeter rule would be in effect at National. It further suggests, contrary to petitioner, that Congress does not perceive perimeter rules, in the context of multiple-airport operators, to be contrary to the scheme it has established to govern the nation's air service.

The physical limitations of Houston Hobby and Chicago Midway—neither of which would be capable of handling long-range, non-stop flights unless existing runways are lengthened into densely populated areas—make the adoption of formal perimeter rules there highly unlikely. Since there is no indication that any other proprietor is likely to impose a perimeter rule, this decision is unlikely to have any significant impact upon the national air transportation system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 87-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,

Petitioner

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent

BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May a local governmental agency limit the distance of non-stop airline flights, in view of section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1305(a)(1), which prohibits states and interstate agencies from regulating the "rates, routes, or services of any air carrier"?

2. Do the "proprietary powers" of airport operators preserved by section 105(b)(1) of the Airline Deregulation Act, 49 U.S.C. app. § 1305(b)(1), include the power to impose an extraterritorial restriction upon the distance of non-stop flights?

3. Does a local governmental agency operating airports have any jurisdiction over the use made by airlines of airport "landing slots" granted by the FAA under 14 C.F.R. §§ 93.121-93.133?

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IN THE

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OCTOBER TERM, 1987

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DELTA AIR LINES, INC.,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

BRIEF AMICUS CURIAE OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief of the Air Transport Association of America is filed with the consent of the parties. Letters of consent from the parties have been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Air Transport Association of America (hereinafter "ATA") is an unincorporated, non-profit trade and service organization headquartered in Washington, D.C., representing the interests of the scheduled

airline industry. ATA's twenty-one U.S. members[1] account for more than 97% of the revenue passenger miles and freight ton miles produced by U.S. scheduled passenger and cargo airlines. The combined domestic and international passenger count in 1986 for U.S. scheduled airlines was 418 million passengers.

The correct construction and application of the federal aviation laws is of critical importance to ATA and its members. Of particular concern is the statutory provision at issue in this case as it functions to protect the right of air carriers to have access to the nation's airports.

The issue of airport access is fast becoming the most important economic issue facing the airline industry. It has been characterized by the Chief Counsel of the FAA as "the most important issue facing aviation in this country and [it] will remain so for at least twenty years."[2] Because of the natural tension between the goals of the Airline Deregulation Act of 1978[3] (hereinafter the "Deregulation Act") and locally imposed restrictions, the scope given by the courts

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[1] ATA operator member airlines are: Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Braniff, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, The Flying Tiger Line, Inc., Hawaiian Airlines, Inc., Midway Airlines, Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Inc., Pacific Southwest Airlines, Southwest Airlines Co., Trans World Airlines, Inc., United Airlines, Inc., United Parcel Service, and USAir, Inc. Associate members are: Air Canada and Canadian Airlines International.

[2] Ellett, *Airport Access Issues*, The Air & Space Lawyer, Summer 1987, at 1, from a speech delivered to the ABA Forum Committee on Air & Space Law, Fourth Annual Forum, October 1986.

[3] Pub. L. No. 95-504, 92 Stat. 1705 (1978).

to the express preemption provision of the Deregulation Act has far reaching economic implications for the nation's air carriers.

In the past few years, local airport authorities have formulated and imposed numerous types of access-related regulations without the institutional concern for the nation's air transportation system that only the FAA can provide. These regulations have led to numerous disputes and threaten to undermine the goals and purposes of the Deregulation Act, disrupt the smooth and efficient operation of the National Air Space System, and interfere with the free flow of the commerce of the United States. Unless clear guidelines are established defining the extent of local authority, local regulations will proliferate even further.

As further noted by the FAA's Chief Counsel:

> We in the FAA are concerned about [the *Western Airlines*] decision. *We are not willing to concede that the current law can be reconciled with a holding that a perimeter rule, which is essentially an airspace regulation, even in the context of a multi-airport system, is not preempted by the Federal Government.* We cannot condone or accept restrictions which, even if reasonable and non-discriminatory, go beyond proprietors' lawful rights and enter the clearly federal domain of regulation of the airspace or regulate a carrier's routes, rates, or services.

Ellett, *supra*, n.2, at 19 (emphasis added).

A Proper resolution of the issues presented by this case is necessary to ensure the integrity of the Der-

egulation Act and to prevent the National Air Space System from crumbling under the stress of restrictive economic regulations, imposed by diverse local airport authorities, under the guise of exercising proprietary powers.

STATEMENT OF THE CASE

The underlying facts and procedural history of this case are set forth in the petition filed herein and will not be repeated here.

REASONS FOR GRANTING THE PETITION

I.

An Authoritative Construction of Section 105 of the Federal Aviation Act Is Essential to the Effective Operation of Deregulation

This case is important because proper construction of Section 105 of the Federal Aviation Act (49 U.S.C. App. 1305) is necessary to carry out the policy of Congress in enacting the Deregulation Act. The relevant portion of that section reads as follows (emphasis added):

> Sec. 105.(a)(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating *to rates, routes, or services* of any air carrier having authority under title IV of this Act to provide air transportation.

* * *

> (b)(1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its *proprietary powers and rights.*

When Congress incorporated this provision in the Deregulation Act, it was well aware of the threat to deregulation posed by state and local authorities. The legislative history of Section 4 of the Deregulation Act, which added Section 105 to the Federal Aviation Act, is replete with references to the confusion and conflicts caused by state forays into the field of economic regulation of air carriers.[4] To clarify the Federal Government's assertion of jurisdiction over all economic aspects of the domestic operations of federally certificated airlines, and thereby remedy the "lack of specific provisions," Section 105 was included in the Act as an express federal preemption provision designed to shield the airline industry from locally

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[4] Examples are:

"The lack of specific provisions [on the jurisdiction of the States and the Federal Government over airlines] has created uncertainties and conflicts . . ." H.R. Rep. No. 1211, 95th Cong., 2d Sess. 16-17 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751; "Section 423 is a new section to the Federal Aviation Act which the Committee has adopted to rationalize a confusing system of dual regulation of federally certificated air carriers that has evolved in some states." S. Rep. No. 631, 95th Cong., 2d Sess., p. 98 (1978), accompanying S. 2493.

imposed economic regulations. The goal, therefore, was not merely to end the confusion of dual regulation; more importantly, for the long term, Congress intended to assure that state and local authorities would not move to fill the vacuum left by the cessation of federal economic regulation of the national air transportation system.[5]

Congress did not enumerate the "proprietary powers and rights" addressed in paragraph (b) of Section 105, leaving it to the Civil Aeronautics Board (the "Board"), its successor the Department of Transportation, and the courts, to determine legitimate "proprietary powers and rights" which would not impinge upon the broad preemption of actions relating to rates, routes and services.

Although the Board quickly addressed the functioning of Section 105 in a formal Policy Statement adopted on February 7, 1979,[6] it declined the opportunity to fully flesh out the meaning of the operative phrase, "proprietary powers and rights." The Board noted that "[t]he full scope of those rights and powers has yet to be developed," and warned that "proprietary rights must be exercised to accomplish legitimate interests *in a manner that does not conflict with the*

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[5] "[I]t is possible that some states will enact their own regulatory ligislation, imposing, utility type regulation on interstate airline service and fares. The [Act] includes a specific statutory provision precluding state interference with interstate service and fares." 124 Cong. Rec. H10007-8 (daily ed. Sept. 23, 1977) (Sectional analysis of H.R. 8813, the Air Service Improvement Act of 1977, an early version of Deregulation Act).

[6] *Implementation of Preemption Provisions of the Airline Deregulation Act of 1978*, PS-83, 44 Fed.Reg. 9948 (Feb., 1979), amending 14 C.F.R. Part 399 (1979).

provisions and policies of the [*Airline Deregulation Act*]."[7]

To date, as the district court below recognized, the extent of airport proprietor rights and powers has not been defined precisely. *Western Air Lines Inc. v. Port Authority of New York and New Jersey,* 658 F.Supp. 952, 956 (S.D.N.Y. 1986). In the address, already referred to, given last year by the Chief Counsel of the FAA, it was noted that:

> The U.S. Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, pointed out in the now famous footnote 14 that a state or local government, as proprietor of an airport, does have some authority to set noise limits at its own airport. The real holding of the case, however, was that Congress, through the Federal Aviation Act and the Noise Control Act of 1972, had preempted non-airport proprietor control over aircraft noise. *Nothing in this case even hints at an extension of airport proprietors' rights into an area outside that of controlling aircraft noise.*
>
> The extent of these airport proprietors' rights has to this day not been clearly defined.

Ellett, supra n.2, at 19 (footnote omitted; emphasis added).

Thus, nearly ten years after the Deregulation Act was passed, it is evident that what Congress meant by Section 105(b)(1), in terms of an airport owner appropriately exercising proprietary powers in its own

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[7] PS-83, *supra*, n.6, at 9 (emphasis added).

behalf or on behalf of its residential neighbors, has not been adequately clarified.

Because of the pivotal importance of Section 105 to the continued benefits of economic deregulation and, therefore, the integrity of the Act so carefully crafted by Congress, this Court should grant the present petition and abort an emerging, *judicially created* conflict between the provision's two subsections.

II. The Statutory Construction Given Section 105 by the Court Below Frustrates The Underlying Congressional Intent.

A. Section 105 Explicitly Distinguishes Between *Governmental* And *Proprietary* Actions By State or Local Authorities.

The key to the proper construction of Section 105 lies in harmonizing the provision allowing state and local authorities to exercise "*proprietary* powers and rights" with the explicit preemption of *governmental* power relating to "rates, routes or services." When the Deregulation Act was passed, several states had created agencies to regulate airline operations within their states. Such state agencies regulated economic aspects of the operations as well as safety matters. *See* Texas Ann. Civ. St. art. 46c-6, subd. 3, as amended (Vernon, Supp. 1987), establishing the Texas Aeronautics Commission.

Also recognized by Congress was the fact that virtually every public airport is owned and operated by a local governmental authority. In contrast to the powers exercised by state regulatory agencies prior to 1978, airport authorities, generally, are granted only those limited powers, incidental to ownership, which are necessary to ensure the proper functioning of a public airport. Typically, such powers include the

control and maintenance of the terminal facilities and roadways, the ability to purchase property and the ability to enter into contracts.

Thus, it is absolutely consistent to say that an airport owner *may not* adopt a rule relating to routes or services, but that it *may* exercise proprietary rights and powers (that is, powers normally associated with the ownership and operation of a public facility). Subsection 105(b)(1) simply ensured that in prohibiting state agencies from imposing economic regulations on air carriers, the rights of airports to exercise powers traditionally exercised were not also swept aside. It was designed to do no more. To read Section 105(b)(1) as allowing airport owners to adopt rules relating to routes and services in the name of proprietary rights and powers is to render subsection 105(a)(1), and thus all of Section 105, meaningless.

The distinction between the exercise of *governmental* rights by state or local agencies, whose limited economic authority over airlines Congress sought to eliminate (except for wholly intrastate service), and the exercise of *proprietary* rights by state or local authorities created to own and operate airport facilities, but not having economic regulatory authority over airlines,[8] is crucial to the effective operation of the Deregulation Act and can only be clarified by a decision of this Court.

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[8] The Port Authority, for example, is not authorized to regulate airline rates, routes and services. *See* N.Y. Unconsol. Laws § 6407, §§ 6631, *et seq.* (McKinney 1979 and Supp. 1987).

B. Contemporaneous Constructions Of Section 105 By The Civil Aeronautics Board Support the Distinction Between Governmental and Proprietary Powers Of State And Local Authorities.

That Congress intended the powers of local authorities to be narrowly limited finds support in contemporaneous Board constructions of Section 105. As already noted, Policy Statement PS-83 states that in exercising proprietary rights, airport owners may not exercise those rights so as to "conflict with the provisions and policies of the ADA."

Even more specific is an opinion of the Board issued only a month after the Policy Statement. In *Austin/San Antonio-Atlanta Service Investigation*, 80 C.A.B. 242 (1979), the City of Austin argued, as the Port Authority does here, that there was a "critical shortage of airport terminal space" at Austin and that multiple awards would have the effect of "congesting airport facilities." *Id.* at 249. The Board not only rejected this argument, but warned:

> it should be emphasized that, *in refusing to impose irrational restrictions on our liberal entry policies, we are by no means conceding that local authorities may lawfully circumvent our policies by imposing the same types of restrictions under the guise of exercising so-called proprietary rights.* Quite the contrary, we think it clear that, under the new section 105(a)(1) of the Act preempting State and local authority over federally regulated routes and rates, it is the Board's actions implementing the Deregulation Act which will ultimately determine whether and in what

> manner new route authority shall be awarded.

Austin/San Antonio-Atlanta Service Investigation, supra, at 250 (emphasis added).

Thus, the Board made clear that it considered itself the sole possessor of jurisdiction over routes, rates and services, and further, that it would not condone interference with that jurisdiction from local authorities purportedly exercising proprietary rights.

Further support is found in a letter from then CAB General Counsel Philip J. Bakes, Jr., to Richard R. Heath, Director of Airports for the Airport Commission of the City and County of San Francisco, dated February 13, 1979.[9] Mr. Bakes' letter discusses the legality of a resolution adopted by the San Francisco Airports Commission to restrict use of San Francisco International Airport by new airlines not then serving the Airport. The rationale given by the Commission to support the resolution was a concern about increased noise due to deregulation. Among other things, the resolution required approval by the Commission of proposed routes and scheduling.

In explaining why Section 105 preempted the resolution, Mr. Bakes stated:

> Non-federal enactments relating to routes, rates and schedules are clearly forbidden by section105(a)(1) of the Federal Aviation Act. While I understand the desire of the Commission that there should be "a convenient level of air transportation service" available to Bay Area residents, any effort by the

[9] Appendix A, p. 1a.

> Commission to decide what that level of service is and to achieve it through the regulation of Bay Area airports is strictly prohibited by section 105(a)(1). The reason is because the Congress decided that those kinds of decisions should be made by travelers and shippers directly through the free play of market forces and that, to the extent governmental decision-making should replace competition and free consumer choice, the CAB should be the sole judge regarding airlines conducting interstate air service. The reason the Congress wants one decision-maker is obvious when you consider the chaos to interstate air service that would result if hundreds of airports around the Nation were conditioning landing and take-off rights on decisions about where the airlines should be flying to and coming from

Letter of Philip J. Bakes, Jr., Appendix A, p. 4a.

Thus, in yet another contemporaneous explanation of Section 105, the Board clearly states that a proprietor's rights and powers may not interfere with the marketplace decisions of carriers concerning their routes, rates and services.

III. The Decision Below Creates The Potential For Significant Disruption Of The National Air Space System And Interference With Interstate Commerce

As air traffic continues to grow under deregulation, local airport authorities, in increasing numbers, are seeking ways to control or limit aircraft operations. The Massachusetts Port Authority, for example, recently announced a plan at Logan Airport to dis-

courage peak-hour traffic by means of a varying fee schedule. The City of Long Beach (California), as this Court is aware,[10] has sought to restrict access by means of a slot rule similar to the FAA's high density rule.

Unless this Court provides an authoritative interpretation of Section 105, more and more local airport authorities are likely to impose increasingly strict regulations "relating to rates, routes or services," in the name of reducing ground-side congestion. This is not idle speculation. The ongoing spread of noise-based rules among the nation's airports[11] is dramatic evidence of the facile ability of airport proprietors to restrict airport access by means such as the perimeter rule in this case. If the decision below stands, it would have a serious practical effect on the National Air Space System.

A few examples demonstrate the substantial number of airline passengers who would be affected if a 1,500 mile perimeter rule were to be adopted at other major airports. Although these examples are hypothetical, they clearly show the potential of the regulation involved here as an interference with the preempted control over "rates, routes or services."

If the nation's busiest airport, Chicago O'Hare, were to adopt a 1,500 mile perimeter rule, a total of 44 flights per day would be eliminated, affecting 5,406

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[10] *City of Long Beach v. AirCal, Inc.*, No. 86-2002, *certiorari denied*, October 5, 1987.

[11] In a 1986 study, the FAA identified 37 noise control strategies in use at approximately 400 airports. Such strategies include number of operations restrictions, aircraft type restrictions, noise level restrictions, curfews, weight or thrust limitations, and noise use fees. *Airport Noise Control Strategies*, FAA Report No. FAA-EE-86-02 (May 1986).

passengers.[12] A similar perimeter rule at Los Angeles International Airport would eliminate 74 flights a day, affecting almost 11,000 passengers daily. If, in addition to these two airports, Atlanta, San Francisco and St. Louis imposed perimeter rules, a combined total of nearly 28,000 passengers per day, or more than 10.1 million passengers per year, would be impacted.[13] Finally, if the other two Port Authority airports were to adopt perimeter rules, an additional 59 flights per day would be eliminated, affecting more than 9,000 people daily.[14]

IV. CONCLUSION

This Court has never interpreted Section 105 of the Federal Aviation Act. Absent such a dispositive interpretation, inconsistent results will flow from increased litigation over the issue of airport access. In view of the importance of a smoothly functioning national air transportation system and the widespread public interest in safe, efficient, and economical airline service, ATA believes that this case presents an ideal opportunity for this Court to provide the clarification needed to resolve this important question of Federal law.

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[12] Based on schedules published in the Official Airline Guide on September 1, 1987, and assuming an average load factor of 60%, which is less than the industry average of 60.6% for 1986, and 62.5% for the first six months of 1987.

[13] Table 1, Appendix B, p. 8a.

[14] Table 2, Appendix B, P. 10a.

Respectfully submitted,

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Dated: October 15, 1987

APPENDIX A

CIVIL AERONAUTICS BOARD
Washington, D.C. 20428

February 13, 1979

Mr. Richard R. Heath
Director of Airports
Airports Commission
City and County of San Francisco
San Francisco International Airport
San Francisco, California 94128

Dear Mr. Heath:

I have received your letter of January 18, 1979, and have analyzed San Francisco Airports Commission Resolution No.79-0003 (January 16, 1979). The Civil Aeronautics Board shares your concern for the environment of the area surrounding San Francisco International Airport. The Board sees to it that the environmental implications of its actions are considered at every stage of the decision-making process. We are also eager to help airport proprietors, such as the Commission, to take reasonable steps to protect their airport's environment. It is in a spirit of cooperation that I and the Board's legal staff have reviewed Resolution No.79-0003.

The resolution severely restricts the use of San Francisco International Airport by new airlines not currently serving that airport. The resolution reflects the Commission's apparent belief that reduced federal economic regulation of air transportation may lead to an increase in commercial jet aircraft operations at the airport, and in turn to added noise levels in surrounding communities. The resolution restricts new airlines in several specific ways. It requires entering airlines to present to the Commission substantial information about proposed operations. Airline

arrangements involving San Francisco Airport concerning routes, scheduling, aircraft to be used, and groundside arrangements, require approval of the Commission. In addition, the resolution puts the Commission in the position of approving subleases and service arrangements involving entering carriers and provides that landing fee agreements will be made "only" with "those carriers [who] agree to exclusively utilize aircraft which are certified as meeting the noise requirements of Federal Aviation Regulation Part 36." Finally, through the resolution the Commission assumes responsibility to take "appropriate actions . . . to provide a convenient level of air transportation service to all Bay Area residents."

I have fundamental legal reservations about the method the Commission has chosen here to advance the obviously important environmental goals which you and the Board want to meet. The action of the Commission conflicts sharply with federal policy as set forth in the Airline Deregulation Act of 1978 (P.L.95-504), which was enacted to foster entry by air carriers into new interstate markets. In addition, the resolution's applicability to new but not incumbent airlines appears to violate the Constitutional prohibitions against discriminatory local regulations of interstate commerce, see *e.g., British Airways v. The Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977). It raises as well the possibility of conflict with grant assurances under the Airport and Airway Development Act (49 U.S.C. Sec. 1718) and thus may jeopardize your right to receive federal grant money administered by the Department of Transportation. The resolution may also violate section 308(a) of the Federal Aviation Act (49 U.S.C. 1349(a)), which provides in part:

> "There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Finally, any attempt to dictate the type of aircraft to be operated—even if applied even-handedly—may conflict with a detailed federal noise policy developed by the Department of Transportation. In light of these legal shortcomings, the Commission may wish to consider rescinding or substantially amending Resolution 79-0003 to conform to federal law. As it stands now, it is vulnerable to legal challenge. And, since it conflicts with the policy of the Airline Deregulation Act which this agency is charged with administering, if the resolution remains in effect, I must consider recommending legal action by the federal government. On the other hand, should the Commission replace it with a non-discriminatory policy restricting use of the airport, we, and I am sure the Department of Transportation, would be more than happy to evaluate that policy independently.

There are three important factors in considering the legality of a restrictive airport use decision. First, is the restriction discriminatory? Second, if the restriction is not discriminatory, is it nevertheless unduly burdensome to interstate commerce? Finally, does the restriction relate to the routes, rates or services of any airline in interstate commerce under authority of the Civil Aeronautics Board?

The Commission's action is discriminatory and thus unlawful because it places substantial and perhaps insurmountable burdens on entering airlines which incumbent airlines do not bear, and puts new entrants at a significant disadvantage in seeking to compete in San Francisco markets. While incumbent carriers are free to add to their schedules at will, and thus may increase their flight frequencies as they choose, the resolution makes scheduling and other operating decisions of entering carriers the subject of a public proceeding, and allows those decisions to stand only if the Commission approves them. In addition, while incumbent carriers may serve the airport with aircraft meeting current federal noise requirements, the resolution places a much stricter standard on the operations

of new entrants and, in fact, *forbids* them to operate the same type of aircraft that incumbents *may* operate.

The particular method the Commission chose to protect against noise may conflict with an area that the federal government has preempted and may also unduly burden interstate commerce. The federal government has a comprehensive noise policy that phases out noisy aircraft over a four-year period and requires airlines to begin flying quieter aircraft in 1981 and to conform their entire fleets by 1985. If the San Francisco Airport, as it purports to do, or any other airport enforces more stringent equipment requirements, there would be a conflict with an area of regulation that the federal government may have preempted and there would probably be a serious disruption in interstate air service because planes lawfully departing from, say, Chicago, New York or Denver would not be able to land in San Francisco.

Non-federal enactments relating to routes, rates and schedules are clearly forbidden by section 105(a)(1) of the Federal Aviation Act. While I understand the desire of the Commission that there should be "a convenient level of air transportation service" available to Bay Area residents, any effort by the Commission to decide what that level of service is and to achieve it through the regulation of Bay Area airports is strictly prohibited by section 105(a)(1). The reason is because the Congress decided that those kinds of decisions should be made by travelers and shippers directly through the free play of market forces and that, to the extent governmental decision-making should replace competition and free consumer choice, the CAB should be the sole judge regarding airlines conducting interstate air service. The reason the Congress wants one decision-maker is obvious when you consider the chaos to interstate air service that would result if hundreds of airports around the Nation were conditioning landing and take-off rights on decisions about where airlines should be flying to and coming from.

Although my legal analysis of the situation does not support the Commission's action, perhaps you may wish to reconsider the policy, as well as legal, assumptions underlying the resolution in light of the considerable body of evidence that suggests that a competitive airline system is more likely than a strictly regulated system to minimize environmental damage. The Commission's premise seems to be that competition and new entry will cause an unacceptable increase in commercial jet operations at San Francisco International Airport. This is not necessarily the case. When airlines are forced to compete in markets, actual competition and the threat of competition by other airlines stimulate incumbent carriers to keep ticket prices down and to operate planes nearly full rather than half empty. Without adequate competition, the demonstrable tendency is the reverse: air carriers tend to charge higher ticket prices, but they compete away the extra revenues in scheduling competition—by offering more flights and thus more operations. This is a situation with which we are thoroughly familiar at the CAB. For almost forty years the CAB regulated the airlines in a way that discouraged price competition. This produced extensive frequency competition, with the result that many airports were subjected to many more landings and takeoffs than were necessary to carry the traffic.

It is the number of aircraft operations rather than the number of airline passengers or the identity of the airline that determines how much noise people living near an airport must suffer. While the lower ticket prices of recent months have stimulated travel, the incentives of deregulation—if price competition is allowed to develop without restriction—are toward putting more passengers in the airplanes before putting more planes in the air. When an airline has to compete in price and keep its costs low, it will tend to hold actual aircraft operations to a minimum. And our experience shows that easy entry by non-incumbent carriers is the single most powerful force to stimulate

price competition. If air carriers not currently serving an airport can arrange to use it without undue difficulty, the mere threat of new entry will encourage incumbent carriers to keep ticket prices as low as possible, and to fill their planes rather than operate half-empty flights, so as to avoid expenses which might make low fare operations unprofitable. So, discriminating against new airlines, and giving significant advantages to existing airlines not only conflicts with federal law but may well conflict with a sound environmental policy also.

The increased competition from new airlines and higher load factors also results in improved energy efficiency. A recent Air Transport Association study shows that scheduled airlines used 50 million gallons less fuel in 1978 than 1973 while carrying 78 million more passengers. Competition and the resulting higher load factors also explain why there were less than two percent more systemwide airline departures in fiscal year 1978 than in the preceding year while passenger enplanements rose nearly 12 percent. At some airports—and our fiscal year 1978 figures show San Francisco to be one of them—the actual number of departures decreased slightly while the number of passenger emplanements rose significantly. Figures for the first quarter of fiscal year 1979 show that although San Francisco International departures have increased modestly over the same quarter of the previous year, actual emplanements increased over 18 percent. Since we are still in a period of adjustment and transition, I would caution anyone, including myself, against using recent statistics to make firm predictions about the future. But, the indications are that increased airline competition and a better environment are not at all incompatible.

I would therefore urge you not only to reconsider the resolution but to consider carefully as well what impact new authority will have on San Francisco International Airport's environment before you make any decisions regarding restrictions which might be proposed to protect

the community's environment. If you determine that restrictions are required in spite of the favorable environmental consequences which may result from increased competition, I urge you to make them consistent with the important legal requirements I have outlined.

Let me repeat again this agency's sincere willingness to be of help. I have been in contact with Clark Onstad, Chief Counsel of the Federal Aviation Administration, and am confident of his and the Department of Transportation's willingness to also assist you in the discharge of y our legitimate and difficult proprietary duties. Both the CAB and the DOT will do all we possibly can to help you implement a plan which meets important legal and environmental requirements.

Sincerely yours,

Philip J. Bakes, Jr.
General Counsel

cc: Clark Onstad
Chief Counsel, FAA

APPENDIX B

Table 1

Origin	Destination	Flights/Day	Passengers Affected Daily
ORD	SFO	19	2,237
	LAX	25	3,169
	Total	44	5,406
LAX	EWR	7	1,175
	JFK	23	4,080
	ORD	26	3,169
	ATL	10	1,484
	STL	8	1,006
	Total	74	10,914
ATL	LAX	9	1,319
	SFO	7	966
	Total	16	2,285
SFO	EWR	4	624
	JFK	14	2,383
	ORD	20	2,445
	ATL	6	907
	IAH	6	484
	STL	4	520
	Total	54	7,363
STL	SFO	5	742
	LAX	8	1,044
	Total	13	1,786

Table 1 (Continued)

	Flights/Day	Passengers Affected Daily
Combined Total	201	27,754/day 10,130,210/yr.

ORD—Chicago O'Hare
LAX—Los Angeles Int'l.
ATL—Hartsfield Atlanta Int'l.
SFO—San Francisco Int'l.
STL—St. Louis, Int'l.
EWR—Newark Int'l.
JFK—Kennedy Int'l.
IAH—Houston Int'l.

Table 2

Origin	Destination	Flights/Day	Passengers Affected Daily
EWR	SFO	4	160
	LAX	7	1,131
	DEN	11	1,356
	Total	22	2,647
JFK	SFO	13	2,262
	LAX	22	4,026
	DEN	2	243
	Total	37	6,541
Combined Total JFK/EWR		59	9,188/day 3,353,620/yr.

DEN—Denver Stapleton Int'l.

Supreme Court, U.S.
FILED
APR 8 1988
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CLERK

No. 87-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC.,
Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE *

The brief filed by the Solicitor General ignores the direct challenge that the decisions below present to the Congressional mandate for uniform airline deregulation. It does this *first* by erroneously assuming that the proprietary powers of a multiple airport operator are different from those of a single airport operator. Section 105, however, does not support this premise. And, *second*, by characterizing the question as "of extremely limited applicability" (U.S. Br. 10), the Solicitor General belittles the widespread impact that these decisions would have even if restricted to multiple airport operators. In fact, they would empower local governments to regulate airline routes, rates, and services from airports in at least seven metropolitan areas across the country serving 137 million passengers annually, or over thirty percent of the total for all United States airlines.

* Compliance with Rule 28.1 has been made in the Petition. Since that time Sky West, Inc., has become an affiliate of the petitioner.

The Solicitor General's reluctance to assert federal preemption leads him to ignore the power and purpose of Congress to replace all government regulation with marketplace competition. Thus, he fails to give proper weight to the serious adverse effects the decisions below would have on airline competition. Although the Solicitor General acknowledges that Congress enacted section 105 "to prevent local regulation from filling the regulatory vacuum [the Airline Deregulation Act] created" (U.S. Br. 5), he fails to recognize that the decisions below would give local governmental airport proprietors, whether multiple or single airport operators, veto power over which routes airlines may fly—the precise type of regulatory power which the Deregulation Act took away from the Civil Aeronautics Board and dedicated to the marketplace. In view of the widespread applicability of the questions presented and the drastic interference local governmental route regulation would cause in the competitive marketplace mandated by the Airline Deregulation Act, certiorari should be granted.

I. The Decisions Below Would Have a Dramatic Adverse Effect on the National Air Transportation System.

In discussing the decisions below, the Solicitor General (1) seeks to limit their effect only to airports operated by multiple airport proprietors, (2) asserts that such proprietors operate in only five metropolitan areas, and (3) claims that the number of affected areas is further reduced by physical limitations of the airports in two of the areas. The argument is wrong on all three fronts.

There is no basis under section 105 for confining the decisions below to multiple airport proprietors. A perimeter rule established by a multiple airport proprietor is no less a route regulation and no more an exercise of a proprietary power than one made by a single airport proprietor. Thus, the district court properly concluded that the perimeter rule regulates routes when it diverts long distance flights away from LaGuardia to other air-

ports. It is, moreover, well-established in both CAB and court decisions that routes are properly defined from an airport-to-airport perspective. *Airport Commission v. CAB*, 300 F.2d 185, 188 (4th Cir. 1962) (CAB may specify airport to serve Winston-Salem area); *City of Dallas v. CAB*, 221 F.2d 501, 504 (D.C. Cir. 1954) (same for Dallas-Fort Worth area); *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644, 652 (1979) (same for Love Field/Dallas-Fort Worth).

The fact that a governmental agency may operate more than one airport has no rational bearing on whether its extraterritorial regulation of routes is the exercise of a "proprietary power." What destination an airplane serves after leaving an airport is not a "local matter" within the legitimate concern of a local proprietor, no matter how many airports it operates in its area. Local governments do not have the national accountability which is necessary to ensure coherence in their attempts to regulate the nation's air routes.[1]

Despite the Solicitor General's attempt to confine the decisions below to multiple airport proprietors, they cannot be so confined. For example, a legal opinion recently rendered by counsel for the Suburban O'Hare Commission interprets the decisions below as holding "that the ability to enact a perimeter rule is within the powers of airport proprietors which are not preempted by federal regulation," with no mention of any limitation to multiple airport proprietors. (App. A, infra p. 1a.)

Even if limited to multiple-airport proprietors, the decisions below would permit locally imposed route limitations on a substantial portion of the nation's air traf-

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[1] Citing *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982), the Solicitor General seeks to equate the powers of the FAA as an airport proprietor with those of local governments. (U.S. Br. 4.) The terms of section 105, however, specifically restrict the powers of local governments, not those of the FAA.

fic. As the Solicitor General concedes, five of the largest metropolitan areas—New York, Los Angeles, Chicago, Washington, and Houston—have airport authorities operating multiple airports with existing commercial service. The Solicitor General attempts to limit the importance of this list by asserting that perimeter rules similar to those at LaGuardia are "highly unlikely" at Houston Hobby and Chicago Midway because these airports are incapable of handling long-range flights. (U.S. Br. 11.) In fact, however, these airports, with runways of 7600 and 6519 feet, respectively, have a long-range flight capacity not materially different from LaGuardia, with its 7000 foot runway, and therefore, if the decisions below stand, Houston and Chicago are prime candidates for perimeter rules. See Jeppeson Airway Manual (1987).

In assessing the practical impact of the decisions below, the State of Hawaii, which also operates multiple airports with commercial service, must be added to this list. Dallas-Fort Worth has a similar situation, with the City of Dallas operating Love Field and Dallas-Fort Worth International Airport under the joint control of both cities.[2]

This roster of major metropolitan areas belies the Solicitor General's attempt to minimize the decisions below. During 1987, the airports in these seven areas had 137 million passenger enplanements, or fully 30.8 percent of the domestic total. Even the five areas which the Solicitor General lists as served by multiple airport proprietors account for 105 million passenger enplane-

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[2] Thus, the City of Dallas has an ability to coordinate restrictions at its two airports similar to the Port Authority's. Indeed, it would appear that even unrelated airport proprietors can easily "coordinate" their regulations and thereby fall within the scope of the decisions below. Logically, therefore, the Solicitor General's proposed distinction has little practical effect at all.

ments, or 23.5 percent of the total for United States airlines.[3]

The expansion of local authority announced by the decisions below is both widespread and striking. Its scope will likely expand as airport operators expand their new powers. For example, Cleveland and Detroit have limited commercial service at secondary airports. Moreover, many cities currently using only one airport for commercial purposes (e.g., Kansas City, Mobile, and Nashville) operate satellite airports capable of handling jet service. The rational of the decision below would also apply to these airports. As the Secretary of Transportation recently acknowledged in commenting on the decisions below, "a proliferation of similar local rules would cripple the national air transportation system . . . ." [4]

II. Section 105(b) Does Not Permit Extraterritorial Regulation of Airline Routes by Local Governments.

In assessing the power of the Port Authority to enact a perimeter rule, it is essential to keep in mind that the rule *directly and extraterritorially* regulates airline routes. Unlike the hypothetical parking restrictions discussed by the Solicitor General, the perimeter rule is not one which merely "might affect the routes" airlines choose to fly, by, for example, making an airport unattractive to vacationers. (U.S. Br. 8.) Instead, by its perimeter rule the Port Authority tells airlines that they cannot fly routes non-stop which are beyond the 1500-mile perimeter.

In enacting the Airline Deregulation Act, Congress replaced the Civil Aeronautics Board's regulatory au-

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[3] *See generally* Compilation by I. P. Sharp, Inc., 1000 Vermont Avenue, N.W., Suite 510, Washington, D.C. 20005, of data from Department of Transportation, Research and Special Programs Administration, Form 41, Schedule T-3.

[4] Letter from Secretary of Transportation James H. Burnley, IV, to R. W. Allen, Chairman of the Board of Delta Air Lines, Inc. (Feb. 16, 1988) at 2, reproduced as Appendix B, *infra* p. 7a.

thority with market forces, not with local governmental regulation. Prior to deregulation, the CAB exercised pervasive authority to control airline routes. *See* Pub. L. 85-726, Aug. 23, 1958, 72 Stat. 731; *see generally* D. McKinnon, *Aviation's Future Under Deregulation*, 32 Fed. Bar News & J. 24 (1985); E. Kennedy, *The American Airlines Industry and the Necessity of Deregulation*, 9 Akron L. Rev. 631 (1976). As demonstrated by the legislative history quoted by the Solicitor General, Section 105(b) was intended to preserve "long recognized" and "existing proprietors' rights" (U.S. Br. 9), not to expand those rights into areas formerly regulated by the CAB. Yet by giving the Port Authority the power to dictate which routes airlines may fly, the decisions below have given section 105(b) precisely the effect Congress intended to prevent.

The LaGuardia, Kennedy, and Newark Airports serve different markets, certainly from the passengers' point of view, and deregulation was clearly intended to prevent local governments and airport operators from telling passengers which market they must choose. Suppose, for example, two independently operated airports—say Scranton and Bethelem—agreed that one should accept flights from certain airports and the other airport would accept flights from other airports. Factually and economically the situation would not be different from that involved here, but it would be clearly a direct, extraterritorial regulation of routes by airport operators.

Nonetheless, the Solicitor General asserts that the LaGuardia perimeter rule is a valid exercise of a proprietary power because it "may be a reasonable way to relieve congestion" (U.S. Br. 6). Petitioner does not dispute that reducing ground congestion is an appropriate local goal. The issue, however, is not *what* goal the Port Authority seeks to achieve but *how* it seeks to achieve it. The *fundamental purpose* of section 105 is to preclude local regulation of rates, routes and services. To say that this can nevertheless be done in the guise of proprietary

powers unduly undermines the basic objective of Congress in enacting deregulation of the airline industry.[5]

The decisions below are especially troublesome because of the broad deferential standard used by the district court and supported by the Solicitor General. Under this standard, the means chosen by the local proprietor "will not [be] second guess[ed]" (Pet. App. 17a), and will be sustained provided they "may be a reasonable way" to achieve the proprietor's goal (U.S. Br. 6).[6] The FAA, acting within its clearly granted powers, has established a slot system to regulate air congestion in the New York area. This is the Congressionally authorized way to control air congestion and precludes any interference with

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[5] As suggested by the Solicitor General's Brief, this end-justifies-the-means analysis would permit many other forms of rate, route, and service regulation. For example, the Port Authority could determine which destinations (such as Bermuda, Nassau, and West Palm Beach) involved predominantly vacation travel and prohibit flights to them. U.S. Br. 4, n.3. Alternatively, the Port Authority could regulate discount vacation fares at LaGuardia.

This sort of uncoordinated regulation by local governments not only would defeat deregulation but also would imperil the continued smooth operation of the nation's air transportation system. For an indication of the possibilities, see the "guidelines for air travel advertising" released on December 17, 1987, by a task force of the National Association of Attorneys General, discussed in OAG Frequent Flyer for April, 1988, p. 42.

[6] Under this analysis, the Port Authority's LaGuardia perimeter rule is sustained as a method of "reduc[ing] congestion at a busy airport in order to encourage use of a less crowded airport" (U.S. Br. 6). If the "congestion" reference is to *ground* congestion, the Port Authority has no power to ease ground congestion by regulating non-stop routes. If the reference is to *air* congestion, the Port Authority obviously has no proprietory powers under section 105 to regulate air traffic. Moreover, air congestion and delays at Kennedy International and Newark Airports are consistently greater than those at LaGuardia. The Department of Transportation's recent on-time statistics at the 27 largest airports in the continental United States rank LaGuardia as 13th in on-time performance, while Newark ranks 23d and Kennedy ranks dead last at 27th. N.Y. Times, Jan. 31, 1988, sec. 10, at p. 8, col. 1.

the use of those slots, once granted. It is inappropriate under section 105, as the courts below have done, to permit local airport operators—for the asserted purpose of controlling ground congestion—to regulate extraterritorially the routes served by the nation's airlines.

CONCLUSION

Regulation of airline rates, routes, and services has long been an exclusively federal matter. Congress has now precluded any local governmental regulation of rates, routes, and services and left those matters to the marketplace, limited only by FAA safety regulation. In enacting section 105 Congress made clear that local governments were not to be permitted to displace the marketplace competition created by airline deregulation. The decisions below permit major airport authorities, and ultimately all airport operators, to become mini-CABs. To fulfill the Congressional purpose and to protect deregulation, certiorari should be granted.

Respectfully submitted,

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April, 1988

APPENDICES

APPENDIX A

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JOSEPH V. KARAGANIS
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January 13, 1988

President Charles Zettek
Village of Elk Grove Village
901 Wellington Avenue
Elk Grove Village, Illinois 60007

Dear President Zettek:

You have requested that we provide you with a legal opinion concerning the ability of the City of Chicago, *as proprietor* of O'Hare International Airport, to regulate aircraft operations at the airport. Our legal opinion is as follows:

> The City of Chicago, *as the airport proprietor*, has the legal ability to restrict aircraft operations at any of its airports, including O'Hare.

Because various *unsupported* claims have been made by various interested parties as to the issue of the City's ability to regulate, we have intensively researched the question. In this letter, we include explicit "chapter and verse" citations to the authorities supporting the above conclusion.

We emphasize that the legal authority of the City to restrict operations is wholly independent from any conditions or restrictions under 14 C.F.R. Part 150. Further, FAA approval is not a legal prerequisite for the exercise of this authority by the City of Chicago.

Under existing law, the proprietor of an airport has the right to impose noise control restrictions on aircraft using the airport. These restrictions include restrictions on the types of aircraft which may use the airport, restrictions on the number of operations at the airport, curfews, trip length restrictions and fleet mix requirements. These types of restrictions find support in FAA's own policy documents and have been upheld by the courts.

The FAA itself has stated:

> Compliance with Part 36 is not to be construed as a federal determination that the aircraft is 'acceptable' from a noise standpoint, in particular airport environments. Responsibility for determining the *permissible noise levels for aircraft using an airport* remains with *the proprietor* of that airport. [T]he noise limits specified in Part 36 . . . . *are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors.* . . .
>
> FAA preamble to Part 36 engine noise standards, 34 FR 18355 (November 18, 1969).

Congress has the power under the Constitution to regulate the operations of airports for noise abatement purposes, but it has chosen not to do so. This congressional policy leaves airport proprietors responsible for the regulation of their airports for noise abatement purposes.

> FAA regulations on sonic booms, 43 FR 28417 (June 29, 1978).

The *Aviation Noise Abatement Policy*, FAA/DOT, FAA-EQ-78-11 (November 18, 1976), published by the FAA, agreed with those judicial decisions which held that proprietor regulations are not preempted by federal law. The document also recognized that proprietors may undertake restrictions subject only to Constitutional prohibitions on interstate commerce and unjust discrimination. See, *Aviation Noise Abatement Policy* at pp. 31-34.

Congress too has explicitly affirmed the proprietor's regulatory authority in 49 United States Code, section 1305 (b) (1). In explaining the purpose of this section of the statute, Senator Kennedy stated that Congress did not want to interfere with the "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level." *Remarks of Senator Kennedy on 49 U.S.C. Section 1305(b) (1)*, at 124 Congressional Record 37419.

The federal courts have repeatedly upheld the power of proprietors, such as the City of Chicago, to control aircraft noise. The United States Court of Appeals for the Ninth Circuit, in *Santa Monica Airport Association v. City of Santa Monica*, 659 F.2d 100 (9th Cir. 1981), upheld local noise reduction ordinances which included: a night curfew; restrictions on low aircraft approaches on weekends; a maximum single noise event level; a prohibition on all jets; and a fine for any jet landings or takeoffs. In upholding the ordinances, the Court stated that:

> We have held that the power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation.
>
> * * * *
>
> The legislative history shows that Congress intended that municipal corporations enact reasonable regula-

> tions to establish acceptable noise levels for airfields and their environs.
>
> * * * *
>
> The reasonable inference . . . is that Congress intended to allow a municipality flexibility in fashioning its noise regulations.
>
> 659 F.2d at 104.

That same year, in *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir.), *cert. den.*, 455 U.S. 1000 (1981), the Ninth Circuit affirmed the right of the of the Hayward Air Terminal, which prohibited noisy aircraft from operating at the airport during nighttime hours, finding that Congress and the FAA had not preempted the area of local regulation.

In *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), the United States Court of Appeals for the Second Circuit affirmed a regulation of the Port Authority of New York and New Jersey which prohibited non-stop flights to or from LaGuardia Airport in excess of 1500 miles. The Port Authority had established the regulation in order to limit congestion at LaGuardia Airport. The Court found that the ability to enact a perimeter rule is within the powers of airport proprietors which are not preempted by federal regulation. 817 F.2d at 227.

As the above discussion reveals, the City of Chicago, as the airport proprietor, has the legal ability to restrict aircraft operations at O'Hare International Airport. These regulations may include curfews, restrictions on aircraft types, restrictions on total noise levels and restrictions on single event noise levels. The ability of the City, as proprietor, to initiate these restrictions is totally unrelated to any Part 150 Study which may or may not be undertaken for the airport.

If you require any further information on this subject, please do not hesitate to contact us.

Sincerely,

/s/ Joseph V. Karaganis
JOSEPH V. KARAGANIS
Counsel, Suburban O'Hare Commission

/s/ Ellen Lois Zisook
ELLEN LOIS ZISOOK
Counsel, Suburban O'Hare Commission

APPENDIX B

[SEAL]

THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

February 16, 1988

Mr. R.W. Allen
Chairman of the Board
Delta Air Lines, Inc.
Hartsfield Atlanta International Airport
Atlanta, Georgia 30320

Dear Ron:

This is in response to your letter regarding this Department's position on Delta's petition for a writ of certiorari seeking Supreme Court review of a decision of the United States Court of Appeals for the Second Circuit. That decision upheld the "perimeter rule" adopted by the Port Authority of New York and New Jersey under which nonstop airline flights of more than 1500 miles to or from LaGuardia Airport are prohibited.

As I believe you know, in 1986 this Department urged the Justice Department to intervene as a plaintiff in the District Court when Western Air Lines originally challenged the perimeter rule. However, the District Court held an evidentiary hearing and ruled in favor of the Port Authority before the Department's request to intervene could be acted upon. Unfortunately, although we continue to believe that the perimeter rule is discriminatory and is not rationally related to the accomplishment of a legitimate proprietary purpose, in light of the record created at that hearing, the District Court's contrary findings are not vulnerable on appeal.

We recognize the competitive consequences that the perimeter rule has on Delta's efforts to compete through its

Salt Lake City hub. However, we are constrained to conclude that this case is not an appropriate vehicle for Supreme Court consideration of the scope of the proprietary exception to federal preemption of local regulation of airline "rates, routes, and services." On the factual record created in the District Court, the Supreme Court would likely believe that the Port Authority had shown a rational connection between its perimeter rule and such proprietary interests as baggage, parking, and terminal overcrowding. Such a perspective, although erroneous, could lead to a broad holding that would legitimize perimeter rules at all airports, and could even lead to an expansion of the proprietor exception in other contexts. We believe that this is a risk that should not, and need not, be accepted.

The Second Circuit opinion is a narrow holding; while we agree with your statement that a proliferation of similar local rules could cripple the national air transportation system, the Second Circuit held only that "the rule, *at least when executed by a multi-airport proprietor such as the Authority*, falls within the proprietary powers of airport operations exempted from preemption by section 1305 (b) (1)." In our view, there is little likelihood that any other multi-airport proprietor will implement such a rule.

As you know, we have suggested to the Port Authority that this dispute could be resolved without additional litigation by virtue of Delta's ability to operate its Salt Lake City flights from its own terminal, which is less crowded than the main LaGuardia terminal. We have been advised that the Port Authority is considering that issue, and we hope that they will be able to accommodate your request.

I hope that this information is helpful.

Sincerely,

/s/ Jim Burnley
JIM BURNLEY